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No. 595

IN THE

Supreme Court of the United States

October Term, 1956

ARTHUR SCHOFIELD, et al.,
Petitioners,

v.

EZRA TAFT BENSON, Secretary of Agriculture and Intervenors,
NEW ENGLAND MILK PRODUCERS' ASSOCIATION, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
Reasons for Granting the Writ	9
Conclusion	20
Appendix A—Statute	21
B—Opinions and Judgment Below	41

Citations

Cases:

A. E. Staley Manufacturing Co. v. *Secretary of Agriculture*, 120 F. 2d 258 (7th Cir. 1941)	11
Alabama Power Co. v. *Ickes*, 302 U.S. 464 (1938)	9
American School of Magnetic Healing v. *McAnnulty*, 187 U.S. 94 (1902)	9
Associated Industries v. *Ickes*, 134 F. 2d 694 (2d Cir. 1943)	11
B. F. Goodrich v. *Federal Trade Commission*, 208 F. 2d 829 (D.C. Cir. 1953)	9
Brannan v. *Stark*, 342 U.S. 451 (1952)	9
Columbia Broadcasting System, Inc., v. *U.S.* 316 U.S. 407 (1942)	8
Euclid v. *Ambler Realty Co.*, 272 U.S. 365 (1926)	10
Ex parte Young, 209 U.S. 123 (1908)	9
F.C.C. v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940)	11
Heikkila v. *Barber*, 345 U.S. 229 (1953)	14
H. P. Hood & Sons v. *U.S.*, 307 U.S. 588 (1939)	7

PAGE

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123 (1951) 12
Kansas City Power & Light Company v. *McKay*, 225 F. 2d 924 (D.C. Cir. 1955, cert den. 350 U.S. 884) 11
Larson v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949) 9
Massachusetts v. *Mellon*, 262 U.S. 447 (1923) 9
Munn v. *Illinois*, 94 U.S. 113 (1877) 15
NLRB v. *Hearst Publications, Inc.*, 322 U. S. 111 (1944) 16
Oklahoma v. *Civil Service Commission*, 330 U.S. 127 (1947) 11
Panama Refining Co. v. *Ryan*, 293 U.S. 388 (1935) .. 13
Parker v. *Fleming*, 329 U.S. 531 (1947) 11
Philadelphia Co. v. *Stimson*, 223 U.S. 605 (1912) 9
Shaughnessy v. *Pedreiro*, 349 U.S. 48 (1955) 12
Stark v. *Wickard*, 321 U.S. 288 (1944) 13
Tennessee Power Co. v. *T. V. A.*, 306 U.S. 118 (1939) 9, 10
Terrace v. *Thompson*, 263 U.S. 197 (1923) 10
Twin City Milk Producers Association, et al. v. *McNutt*, 122 F. 2d 564 (8th Cir. 1941) 17, 19
U.S. v. *Rock Royal Co-op.*, 307 U.S. 533 (1939) 7, 15
U.S. v. *Ruzicka*, 329 U.S. 287 (1946) 19
U.S. v. *Storer*, 351 U.S. 192 (1956) 11

Constitution and Statutes:

Constitution, Amendment V 3, 10, 15
Administrative Procedure Act, 60 Stat. 238 et seq 3, 14, 19
5 U.S.C. 1001 ..... 3, 11
5 U.S.C. 1009 ..... 3, 11

PAGE

Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 et seq. ..3, 14, 18
7 U.S.C. 601 7
7 U.S.C. 602 (1) 6, 7, 17
7 U.S.C. 608c (9) (B) (i) 4
7 U.S.C. 608c (12) (19) 5
7 U.S.C. 608c (3) (4) 16
Declaratory Judgment Act, 48 Stat. 955, as amended, 28 U.S.C. 2201 3
Federal Food, Drug and Cosmetic Act, 52 Stat. 1046, 21 U.S.C. 341 (a) 18
11 D. C. Code, Secs. 301 and 305, as amended..... 3

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Arthur Schofield, Francis V. Adams on behalf of themselves and of the Central Massachusetts Dairy Association, a voluntary association of Massachusetts milk producers, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on June 29, 1956.

OPINIONS BELOW.

The October 6, 1955 memorandum opinion of the United States District Court for the District of Columbia granting the temporary injunction, its October 21, 1955 opinion denying respondent Benson's motion to modify and the June 29, 1956 opinion of the United States Court of Appeals for the District of Columbia Circuit are all un-

reported. The three opinions are printed in Appendix B, infra, p. 41.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 29, 1956 (R. 791). A timely petition for rehearing was denied on September 11, 1956 (R. 811). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

Whether a producer of milk who is adversely affected by an order of the Secretary of Agriculture extending the limits of a Marketing Area has standing to seek judicial review of such order subjecting him to regulation under a statute which contains no specific provision for his relief either administratively or judicially.

Whether in a regulatory order extending a Marketing Area, which abrogates existing State regulations and the contractual relations of a milk producer with his local handler, the Secretary of Agriculture is required as a prerequisite to the issuance of such order to make specific jurisdictional findings of fact based upon evidence in the administrative hearing that there is a disorderly market or threat thereof and that the regulatory order is necessary to establish orderly marketing conditions.

Whether the interpretation and application by the Secretary respondent of the provisions of the Agricultural Marketing Agreement Act of 1937 in a manner which the District Court found to be "the threatened death-knell" (R. 289) of the milk producer's business and to an area in which marketing conditions are not disorderly, is a deprivation of property without due process of law, not within the commerce power and, therefore, unconstitutional.

STATUTE INVOLVED

The statutory provisions involved are the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601, 602, 608c. They are printed in Appendix A, infra p. 21.

STATEMENT

Petitioners, who are president and secretary-treasurer of the Central Massachusetts Dairy Association, a voluntary association of milk producers, brought this action on September 19, 1955 against the Secretary of Agriculture, respondent, on behalf of themselves and ninety-five other members of the Association, all dairy farmers living in central Massachusetts.

Petitioners invoked the jurisdiction of the District Court on the ground that the action arose under the Agricultural Adjustment Act, as amended (7 U.S.C. 601 ff.); the Declaratory Judgment Act (28 U.S.C. 2201); the Administrative Procedure Act (5 U.S.C. 1009); and the Constitution of the United States, Fifth Amendment. The general equity jurisdiction of the District Court was also invoked under 11 D.C. Code, Sections 301 and 305, as amended.

The District Court entered an order granting petitioners a temporary injunction (Appendix B, infra, p. 46).

On appeal the Court of Appeals reversed with an opinion holding that the petitioners had no standing to sue and that the suit was premature (Appendix B, infra, p. 49).

After hearings held in April and May, 1955, relating in part to the proposed extension of the Greater Boston Marketing Area to the towns of Framingham, Natick, Wayland and Weston (all supplied with milk by petitioners' Association) and certain other towns, the respondent published a recommended decision on June 29,

1956 (R. 13). On September 13, 1955 respondent filed his final decision (R. 27).

Exceptions were filed by petitioners and by Massachusetts (R. 20, 24). However, respondent on September 16, 1955, published the amendatory order (Appendix B, infra, p. 42).

Petitioners contended the hearing had not established the existence of a disorderly market; that respondent's findings were without support in, and were contrary to, the record (R. 20-23, 24-26, 475, 477); were unlawful and insufficient to justify an order which threatened petitioners with ruin (R. 178, 263). They also contended that the referendum was an illegal sham (R. 519-521).

The extension was opposed by Massachusetts (R. 24, 692); the Massachusetts Farm Bureau Federation (R. 391); the Massachusetts State Grange (R. 570) and numerous milk producers. The Farm Bureau witness testified that there was no unstable market, and that the motivating force herein was the N.E.M.P.A.'s effort to monopolize the milk marketing business (R. 392-395).

The amount of unregulated milk or of Boston pool milk supplied to the four towns or its cost does not appear in the record (R. 340-343, 431, 438, 442-444, 471). Approximately 13,000 producers supply the Boston Area of whom about 10,000 are members of the cooperative associations, intervenors herein. An indeterminate amount of the milk from an indeterminate number of the 10,000 members finds its way directly or indirectly to consumers in the four town area. These 10,000 producers through their associations petitioned for the extension of the Boston Area (R. 7).

Respondent Benson conducted a referendum pursuant to 7 U.S.C. 608c(9)(B)(i), Appendix A, infra, p. 32 to ascertain whether two-thirds of the producers assert-

edly supplying the Boston area and the proposed additional area approved the proposed amendments. In so doing, the Secretary respondent made no determination as to the number of Boston area producers actually supplying the four town area or the volume of milk coming into the four town area from the Boston area producers. He determined that it was impracticable to ascertain such number or volume. Thus the Secretary respondent authorized the referendum to be conducted among all the Boston area producers and the four town area producers on the theory that it was not necessary to ascertain what producers were actually supplying milk for the four town area or the volume thus supplied.

Since the cooperative associations, who by statute, (7 U.S.C. 608c (12), (19), Appendix A, infra, pp. 33, 38), are entitled to block vote for their 10,000 membership, had petitioned for the regulatory order now under attack the resulting vote in favor of inclusion of the four town area was a foregone conclusion. Petitioners, as did the Commonwealth of Massachusetts in its exceptions, contended that such a referendum was a sham and a mockery. (R. 26, 10, 395). The petitioners were at the mercy of the voting power of the cooperative associations who had testified that, "The primary reason for the proposed extension of existing marketing areas is to recover Class I sales now being lost to unregulated milk." (App. 336, See 397, 406). In other words, the referendum had little or nothing to do with ameliorating milk surpluses (R. 558, 572) or establishing orderly marketing conditions (See R. 20-23, 25). It was a means of compelling petitioners to accede to the cooperatives' demands or to lose their businesses (R. 391-395, 406, 489, 514). The District Court found that the proposed extension would yield the cooperatives the trivial gain of about $15 per annum per member (R. 289). This finding had previously been conceded as correct by the counsel for the Secretary respondent (R. 250).

The District Court also stated that the proposed amendment was to eliminate the asserted competitive advantage one handler was having in the four town area. In this connection, the District Court stated: "I do not believe that is justification for the ruination of these small farmers . . ." (R. 290). See Secretary respondent's findings, (R. 30, 32).

The Secretary made no specific findings that the proposed amendment was necessary in order to establish or maintain "orderly marketing conditions" 7 U.S.C. 602(1), Appendix A, infra, p. 21, in the four towns or in the Boston area, nor was there evidence on which these findings could have been based. Such specific findings had been made in the *original* order establishing the Boston Marketing Area in 1937, nineteen years earlier. So far as petitioners have been able to ascertain these specific findings have appeared in every order, save the present, establishing a milk marketing area.

In the present case there are only general findings that the twenty-one proposed amendments to the Boston order "will tend to effectuate the declared policy of the act" (R. 60). The four town area extension is but one of the twenty-one proposed amendments covered by the general findings.

Petitioners contend that such specific findings, or at least a basis for such findings, are jurisdictional prerequisites to the exercise of the Secretary's power in promulgating the proposed amendment extending the area.

The Secretary's decision itself admits the absence in the record of basic data necessary to prove the existence of a disorderly market or to prove the necessity of the regulation in order to establish an orderly market. The decision states, "statistics on relative volumes, numbers of routes and similar quantitative data are lacking . . ." (R. 30). It also states, "the record is not clear" (R. 32)

in regard to the milk cost or the manner in which the four town area receives unregulated milk, or milk from the Boston pool. See R. 267, 442-445, 471, 475, 498, 519, 559.

The Act, 7 U.S.C. 601, Appendix A, infra, p. 21, is conditioned upon "disruption of the orderly exchange of commodities in interstate commerce . . ." It also declares the policy, 7 U.S.C. 602(1), Appendix A, infra, p. 21, that the Secretary's powers shall be exercised "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices . . ."

In *H. P. Hood & Sons* v. *U. S.*, 307 U.S. 588; *U. S.* v. *Rock Royal Co-op.*, 307 U.S. 553 and other cases relied upon by the Secretary there had been a specific finding based on evidence that the regulatory order was necessitated by disorderly marketing conditions. In both last cited cases the state authorities had agreed with the findings and with the Secretary's action. In the present instance, Massachusetts through its Governor appeared in opposition at the hearing and filed exceptions (R. 692, 24). At the behest of a cooperative, intent on monopoly, the Secretary discarded the policy of cooperation with states as contained in the Act, Appendix A, p. 39.

In the complaint filed in the District Court, petitioners claimed that they would suffer irreparable injury and be deprived of property without due process of law if injunctive relief were not afforded them. Because the proposed extension of the Boston Area to the four towns would result in prices substantially lower than those now paid to the members of the petitioners' association under the jurisdiction of the Massachusetts State Milk Control Commission each of the members of the plaintiff association would lose an average income of $1,000 a year, an amount in excess of their average annual profit, and suffer irreparable capital loss, forcing all or most of them out of business (Appendix B, infra, p. 48, R. 515, 519, 766).

A restraining order was issued by the District Court on September 19, 1955. The parties then stipulated that the respondent would not issue an order effectuating the proposed amendment and petitioners would consent to dissolution of the restraining order (effected September 21, 1955), pending decision on petitioners' prayer for temporary injunction. Respondent then completed the proposed referendum and tabulated the results, which of course were overwhelmingly in favor of the amendment.

The District Court, in a memorandum opinion filed on October 6, 1955 (Appendix B, infra, p. 41) issued a preliminary injunction (Id. at p. 46) after further hearing on the proposed form thereof (R. 245-295).

The District Court did not set forth findings of fact and conclusions of law on which its injunction was based. However, such findings and conclusions were apparent from the memorandum opinion, and from the opinion (made after hearings on October 20, 21, 1955) denying respondent's motion to modify the decision (Appendix B, infra, p. 47) and the Court of Appeals chose to overlook this technical deficiency.

Respondent Secretary appealed to the Court of Appeals, which on June 29, 1956, reversed and remanded the case to the District Court (Id., infra, at p. 56). Judgment was entered on that date. The Court of Appeals held that petitioners had no standing to sue, and had shown no "legal wrong," noting also that it thought the action premature since the order had not in fact been made effective. The question of prematurity is now moot since the regulatory order under attack was made effective by the Secretary respondent on November 1, 1956. In any event, the immediate threat of irreparable injury by reason of the Secretary's proposed regulation would have been sufficient to present a justiciable controversy. *Columbia Broadcasting System, Inc.*, v. *United States*, 316 U.S. 407 (1942); *B. F.*

Goodrich v. *Federal Trade Commission*, 208 F.2d 829 (D. C. Circuit 1953).

Petitioners now petition this Court for a writ of certiorari to the Court of Appeals, for the reasons set forth below:

REASONS FOR GRANTING THE WRIT

1. Standing to Sue. The decision of the Court of Appeals in this case that petitioners have no standing to maintain their suit is in direct conflict with decisions of this Court, and of other Courts of Appeals, and is contrary to the provisions of 5 U.S.C. 1009, the force and effect of which never have been explicitly delineated by this Court.

a. *Conflict With Supreme Court Decisions.* This Court long has held that a private party injured by action of a federal official who is exceeding the scope of his statutory authority, or abusing the discretion imposed in him (which, in a sense, is exceeding his authority), may obtain judicial relief to restrain such action and enforce conformity to statutory provisions. Decisions are collected in the dissenting opinion of Mr. Justice Frankfurter in *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 710, 731 (1949); for example, see *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902); *Ex parte Young*, 209 U.S. 123; *Philadelphia Company* v. *Stimson*, 223 U.S. 605, 621 (1912). See also *Brannan* v. *Stark*, 342 U.S. 451, 453 (1952).

Such is the interest of petitioners. They do not seek to vindicate a public interest (cf. *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923)). Neither are petitioners, competitors of the Government, or of organizations subsidized by the Government, as was the situation in, e.g., *Alabama Power Company* v. *Ickes*, 302 U.S. 464 (1938); *Tennessee Power*

Company v. *T.V.A.*, 306 U.S. 118, 135 (1939). Since the regulation, as found by the District Court, threatens the petitioners' farm businesses with ruin their suit does not fall within the line of cases barring judicial review to the beneficiaries of Governmental action, or to bidders allegedly aggrieved by provisions required to be contained in Government contracts.

Petitioners are pursuing their calling as the owners and operators of dairy farms. Such property has value because it can produce income. To deprive petitioners of the income is to deprive them of their property. See *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926); *Terrace* v. *Thompson*, 263 U.S. 197 (1923). When the Secretary threatens regulatory action beyond the scope of his statutory authority which will operate to deprive petitioners of income and will inflict capital losses upon them, he threatens to deprive them of their property without due process of law, contrary to the Fifth Amendment of the Constitution of the United States. Moreover, the regulatory action, not being based on any finding that the activities of petitioners are causing a disorderly marketing condition in either the Boston or the four town area, is an arbitrary exercise of power which destroys the fundamental right of the petitioners to pursue their callings.

Loss of income or capital alone does not give standing to sue. *Tennessee Power Company* v. *T.V.A.*, 306 U.S. 118 (1939).

Loss of income from property and loss of capital because of unlawful and improper regulatory action confers such standing under the decisions of this Court, and in light of all equitable principles.

b. *Conflict With Courts of Appeals Decisions.* With few exceptions, the Courts of Appeals which have been confronted with similar situations involving parties adversely

affected by Governmental *regulatory* action have followed the decisions of this Court. The District of Columbia Court is no exception. See *Kansas City Power & Light Company* v. *McKay*, 225 F. 2d 924, 933, 934. (D.C. Circuit, 1955, cert. den. 350 U.S. 884).

c. *Administrative Procedure Act.* The decision of the Court of Appeals is contrary to the express provisions of the Administrative Procedure Act, which the Court of Appeals ignored in its decision, and to the cases decided by this Court which interpret that statute. The Act, 5 U.S.C. 1009(a) provides:

> "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

The Secretary is an agency within the meaning of the Act. 5 U.S.C. 1001(a).

As noted above, petitioners suffer legal wrong by being subjected to a regulation beyond the scope of respondent's statutory authority or which is unconstitutional as construed and applied. They are "aggrieved" and "adversely affected" as this Court and lower courts have interpreted those terms. The regulation, as found by the District Court, threatens their livelihoods. *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, (1940); *Parker* v. *Fleming*, 329 U. S. 531 (1947); *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127 (1947); *A. E. Staley Manufacturing Company* v. *Secretary of Agriculture*, 120 F. 2d 258 (7th Cir. 1941); *Associated Industries* v. *Ickes*, 134 F. 2d 694, 705 (2d Cir. 1943). The petitioners also are aggrieved because the regulation presently affects their contractual relationships (R. 91, 93, 277, 278) with handlers. *United States* v. *Storer*, 351 U.S. 192, 199 (1956). (1956).

Moreover, since the regulation destructively impairs the common-law and constitutional right of the petitioners

to pursue their callings as dairy farmers and there is no specific finding, or basis for finding, that the regulation is within the scope of the administrator's statutory authority to take action to correct disorderly marketing conditions, the petitioners have standing. They are also entitled to a fair hearing upon the fundamental facts concerning whether a disorderly market requires the instant regulation which the District Court found would be their economic death-knell. See *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 152, 153, 161 (1951).

That the Administrative Procedure Act may confer standing to sue where formerly there was none was made clear by this Court in *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955).

This Court should clarify the force and effect of the Administrative Procedure Act on this and similar marketing area extension cases. The present case appears to be the first in which the Secretary respondent has made a milk order placing an area under regulation without making a finding that there is a disorderly marketing condition. There is no evidence or finding that the production or marketing activities of the petitioners are within the mischief aimed at by the statute. The evidence is undenied that petitioners' scientific methods of even production carried on in a high operating cost area (both tax-wise and otherwise) contributes to market stability at no higher cost to the consumer, and contributes to the lessening of the necessary evil of surplus milk. The alleged "preferential" market enjoyed by the petitioners is one they have earned by thoughtful work. There is no basis for the contention that they are seeking to maintain a preferred position at the expense of other producers (R. 116). The four town area producers do not contribute to the Boston pool surplus milk. In flush seasons the demand in the four town area helps to absorb Boston

surplus milk (R. 522). The regulation provides only trivial benefits for other producers (Appendix B, infra, pp. 48, 49).

The Court of Appeals, Appendix B, infra, p. 53 indicated that petitioners as producers had no right to test the legality of the regulation by way of injunction because, it said, the handlers had no such statutory right and petitioners could not be in a better position. This is a complete frustration of the Administrative Procedure Act. It is contrary to the settled law that where there is *regulatory* action by the Government which affects or threatens to affect a plaintiff adversly he is entitled to seek the exercise of the constitutional equity powers of the Federal courts. In addition to its error in the foregoing respects the decision is in direct conflict with *Stark* v. *Wickard*, 321 U. S. 288 (1944).

It was error to deny petitioners the opportunity to establish in court that there has been no determination of the facts requisite to validate the issuance of the present regulation. The decision below ignored the absence of a finding, or any basis for finding, that there is a disorderly market.

". . . If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board, or commission, and, if that authority depends on determinations of fact, those determinations must be shown . . ." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 432 (1935).

Furthermore, the asserted premise, which we contend a District Court trial would establish as false, that petitioners are self-seeking producers trying to maintain a favored position at the expense of Boston pool producers should not be permitted as a smoke screen to hide the fundamental defect of lack of specific findings or evidence that there is a disorderly marketing condition (See Ex-

ceptions of Commonwealth of Massachusetts, R. 25 also 355, 392, 475, 518). Judicial scrutiny of facts of record instead of acceptance of general findings and of a generalized essay in a Government brief concerning the admitted problems created by the burdensome surplus milk problem is necessary in this case if justice is to be done to these particular litigants and to the numerous other dairy farmers throughout the nation similarly circumstanced. The favored statutory position of cooperative associations should not be carried so far as to allow them the advantage of having the Government as their protagonist in depriving independent milk producing farmers of their traditional local market where conditions are orderly. As noted above, local handlers have notified petitioners they will no longer handle their milk if the regulation is made effective (R. 93, 518).

d. *Effect of Statute.* The decision of the Court of Appeals, that judicial review of the Secretary's threatened action is barred by the provisions of the Marketing Act, is in direct conflict with the terms of the Administrative Procedure Act and the decisions of this Court.

The Court of Appeals ignored the Administrative Procedure Act in rendering its decision. This Court now should make it clear that the Administrative Procedure Act is applicable herein. This is precisely the sort of situation which the Administrative Procedure Act is designed to cover. It was intended to be far-reaching remedial legislation, to protect persons in the status in which petitioners find themselves, *Heikkila* v. *Barber*, 345 U.S. 229 (1953). A decision of this court to that effect will be of inestimable importance and assistance to the many Federal courts on all levels which will be confronted with similar problems in the future.

2. Constitutionality. Petitioners contend that the action of the Secretary, purporting to be under the provisions of the Agricultural Marketing Agreement Act,

deprives them of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. If the Secretary's action was not within his granted statutory authority, petitioners are entitled to the relief they seek; if the Secretary's action is within his statutory authority, the statute as so applied is unconstitutional.

The "constitutionality" of the statute, upon a record showing a specific finding based on evidence that the regulatory order was necessary to establish orderly marketing conditions, has been upheld by this Court. *United States* v. *Rock Royal Co-op.*, 307 U.S. 533 (1939). But clearly the mere existence of the statute does not deprive petitioners of property rights; rather, it is by application of the statute that the provisions of the Fifth Amendment may be contravened, and in this instance constitutionality must be measured by application. The statute must be interpreted and applied within the bounds set forth by the Fifth Amendment.

It is not disputed that the Commerce Clause permits the regulation of local activity having an adverse effect upon interstate commerce, here the production and handling of milk and its byproducts. Petitioners contend, however, that the statute is constitutional as a valid exercise of the commerce power only if its application is restricted to situations involving disorderly local market conditions or those affecting Interstate Commerce markets. This question apparently has never been determined.

The deprivation of property by regulation is by due process of law only if such deprivation and regulation is necessary to accomplish the purpose of the statute (here the regulation of interstate or foreign commerce). See *Munn* v. *Illinois*, 94 U.S. 113 (1877). In the absence of disorderly market conditions and evidence showing

that the administrative action is necessary in order to establish such conditions, there is no constitutional basis for the regulation.

This court should now clarify the problem by deciding that the statute may not constitutionally be applied to situations where the Secretary has not found, and has no basis in the record for finding (see *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111 (1944)), that disorderly market conditions exist in the area proposed to be regulated. Regulatory action causing ruin to local dairy farmers must be shown to be necessary for the accomplishment of the statutory purpose of establishing orderly marketing conditions. Otherwise it is unconstitutional.

The Secretary respondent contends that he may overlook the lack of basic data in the hearing and may issue the regulation without making any specific finding that there is a disorderly marketing condition. His position seems to be that issuance of the regulation does not require proof of an unstable market and that the exercise of his discretion in promulgating the order is not subject to judicial review.

In his Court of Appeals' brief the following semantic disguise for administrative absolutism appears at p. 35:

> " . . . Moreover, the question of whether a milk market is stable, of course, is one of judgment, one 'which rests upon considerations not entirely susceptible of proof or disproof.'[70] It falls into the area of administrative discretion and technical details of the milk business, which is not subject to judicial review.[71]"

This administrative interpretation reduces the statutory provision for hearing (7 U.S.C. 608c (3)(4), Appendix A, infra, pp. 25, 26) to a meaningless formality. It nullifies the statutory limitations upon the exercise of the Secretary's powers. Congress has specified that the Secretary should exercise the powers conferred upon him for the purpose of establishing and maintaining orderly

marketing conditions (7 U.S.C. 602(1), Appendix A, infra, p. 21). The statute does not purport to grant discretionary authority in the Secretary to determine the limits of his statutory authority.

We contend that where there are no specific findings, or basis therefor, that unstable marketing conditions require regulatory action, and the statute does not delegate untrammeled administrative discretion, the question of the permissible area of administrative discretion is irrelevant. We also contend there is no room in this case for invocation of the presumption of validity, to support the Secretary's action. Due process requires that there be an unequivocal showing in the administrative hearing of the facts bringing the proposed regulatory action within the primary statutory purpose of stabilizing markets. Presumptions that discretion has been properly exercised are not enough when a producer's economic life is at stake. *Twin City Milk Producers Association et al* v. *McNutt*, 122 F. 2d 564, 567 (8th Cir. 1941).

3. Equitable Considerations. The decision of the Court of Appeals conflicts with decisions of this Court and of other courts of appeals, as noted above. Petitioners contend that the decisions of this Court are sound, equitable, and of proper application to this case, and that the decision of the Court of Appeals was unreasonable, unconscionable, and prejudicial to petitioners, and should be corrected in the interests of justice.

4. Importance of the Case. The Supreme Court should decide the major issues presented by this case.

The Secretary of Agriculture currently proposes to extend existing marketing areas, under conditions similar to those of this case, in a number of other localities. Hearings have been in process for several months. It will be to the advantage of all parties concerned and to the general milk-consuming public if this Court clarifies

the powers and duties of the Secretary and the rights of dairy farmers in their local orderly market.

Much needless and expensive litigation can be avoided by a present resolution of the questions presented by this case. Dairy farmers are entitled to know whether it is lawful for the Secretary respondent to enlarge existing marketing areas by granting a cooperative association's petition therefor and then to permit the bloc voting of the cooperative membership to be used as establishing two-thirds producer approval of the amendment when the record contains no evidence of the actual number of members of the cooperative who supply milk to the area proposed to be added and no evidence of the volume of such milk. Dairy farmers are also entitled to know whether, under the circumstances herein, where there is no finding of a disorderly market, it is lawful for the Secretary respondent to displace State milk regulations and to abrogate their contractual relations with local handlers and to destroy their scientific production pattern of evenness and quality.

A clear present decision will enable other milk producers throughout the nation to plan for the future, by indicating whether it is feasible for them to adopt long-range market-stabilization methods, impracticable if the threat of extension of present Marketing Areas to stable areas hangs over them. The advantages of such programs to the consumer, as well as to the farmer, are not disputed.

The decision of the court below leaves in confusion the intent and meaning of important provisions in the Agricultural Marketing Agreement Act of 1937. According to the decision, the Act grants the Secretary carte blanche, non-reviewable discretionary power to extend a milk marketing area to the ruination of local dairy farmers in the absence of any specific finding or any basis for finding that there are disorderly marketing conditions. The statute, unlike the Federal Food, Drug and Cosmetic Act, 52 Stat. 1046, 21 U.S.C. 341(a), does not provide that:

"Whenever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations . . ."

The decision below approving the regulation in the absence of a specific finding or evidence to support such finding, that there is a disorderly marketing condition, is in conflict with the principles expounded in *Twin City Milk Producers Association, et al* v. *McNutt*, 122 F. 2d 564, 566 (8th Cir. 1941): " . . . Absent the right to a direct judicial review of the order, the presumption of regularity which ordinarily attaches to official action would probably be conclusive of the question.[4] But where a court is charged with the duty of reviewing the validity of an administrative agency's order, it has, up to the present time at least, refused the stamp of judicial approval, unless the order affirmatively demonstated a compliance with all express and implied conditions underlying the exercise of the power . . ."

The decision of the court below interprets the Agricultural Marketing Agreement Act of 1937 as one which affords handlers access to administrative and judicial review (See *United States* v. *Ruzicka*, 329 U.S. 287, 291 (1946) but denies these remedies to producers whose livelihoods are threatened by the regulation. Cooperatives intent on monopoly are given standing but independent farmers are not.

The questions in the present case, we believe, are of sufficient far-reaching importance in the continuing administration of the Act as to deserve consideration by this Court.

Moreover, this Court never has clarified the force and effect of the Administrative Procedure Act on standing to sue. The decisions of the lower courts on the subject have been conflicting and confusing. It is of paramount importance that this problem be clarified: and this case is an appropriate one in which to so act.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

HALE AND DORR,
Of Counsel.

November 1956.

APPENDIX A

Statute Involved

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. 601 ff., provides in part:

SEC. 601. DECLARATION OF CONDITIONS.

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

SEC. 602. DECLARATION OF POLICY; ESTABLISHMENT OF BASE PERIODS FOR PRICES; MARKETING STANDARDS.

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-604 and 607-620 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301 (a) (1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title which has for its purpose the maintenance

of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613-619, 620, 623, and 624 of this title, to establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c (2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c (2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

SEC. 608a.

(5) Forfeitures.

Any person willfully exceeding any quota or allotment fixed for him under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title by the Secretary of Agriculture, and any other person knowingly participating, or aiding, in the exceeding of said quota or allotment shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

(6) Jurisdiction of district courts.

The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title, in any proceeding now pending or hereafter brought in said courts.

(7) Duties of district attorneys; investigation of violations by Secretary; hearings.

Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to said sections, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

(8) Cumulative remedies.

The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title or now or hereafter existing at law or in equity.

(9) "Person" defined.

The term "person" as used in sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title includes an individual, partnership, corporation, association, and any other business unit.

COMMODITY BENEFITS

SEC. 608b. MARKETING AGREEMENTS; EXEMPTION FROM ANTI-TRUST LAWS.

In order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: *Provided*, That no such agreement shall remain in force after the termination of said sections.

SEC. 608c. ORDERS REGULATING HANDLING OF COMMODITY— (1) ISSUANCE BY SECRETARY.

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title as "handlers." Such

orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except canned or frozen grapefruit, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, and Idaho, and not including fruits, other than olives and grapefruit, for canning or freezing), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing), soybeans, hops, honeybees and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin): *Provided*, That no order issued pursuant to this section shall be effective as to any grapefruit for canning or freezing unless the Secretary of Agriculture determines, in addition to other findings and determinations required by this title, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the Secretary, have been engaged in canning or freezing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period.

(3) Notice and hearing.

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of sections 601-608, 608a, 608b,

608c, 608d-612, 613, 614-619, 620, 623, 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order.

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of said sections with respect to such commodity.

(5) Milk and its products; terms and conditions of orders.

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered:

subject in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this section.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of the two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to proudcers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefore from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk,

the marketing in that area of any milk or product thereof produced in any production area in the United States.

* * * *

(7) Terms common to all orders.

In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610 (g) of this title, unless such person receives compensation for his personal services from funds of the United States.

* * *

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) and necessary to effectuate the other provisions of such order.

(8) Orders with marketing agreement.

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided,* That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the

marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(9) Orders with or without marketing agreement.

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed

within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(10) Manner of regulation and applicability.

No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of

industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

(11) Regional application.

(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

(12) Approval of cooperative association as approval of producers.

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

(13) Retailer and producer exemption.

(A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title shall be applicable to any producer in his capacity as a producer.

(14) Violation of order; penalty.

Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: *Provided*, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this

subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary.

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law in praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States (including the district court of the United States for the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection shall not impede, hinder, or delay the United States or the Secretary

of Agriculture from obtaining relief pursuant to section 608a (6) of the title. Any proceedings brought pursuant to section 608a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection.

(16) Termination of orders and marketing agreements.

(A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such

marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

(17) Provisions applicable to amendments.

The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders: *Provided,* That notice of a hearing upon a proposed amendment to any order issued pursuant to this section, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof.

(18) Milk prices.

The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market

supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

(19) Producer referendum for approving order.

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 ~~of~~ this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section.

* * * *

SEC. 610. ADMINISTRATION GENERALLY—(A) APPOINTMENT OF OFFICERS AND EMPLOYEES; EXEMPTION FROM CIVIL SERVICE REGULATIONS; SALARIES; IMPOUNDING APPROPRIATIONS.

* * * *

(b) State and local committees or associations of producers; handlers' share of expenses of authority or agency.

(1) The Secretary of Agriculture is authorized to establish, for the more effective administration of the functions vested in him by sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title, State and

local committees, or assocations of producers, and to permit cooperative associations of producers, when in his judgment they are qualified to do so, to act as agents of their members and patrons in connection with the distribution of payments authorized to be made under section 608 of this title. The Secretary, in the administration of said sections, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative assocations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

* * * *

(i) Cooperation with State authorities; imparting information.

The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: *Provided,* That information furnished to the Secretary of Agriculture pursuant to section 608d (1) of this title shall be made available only to the exent that such information is relevant to transactions within the

regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 608d (2) of this title.

(j) Definitions.

The term "interstate or foreign commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title (but in no wise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title. As used herein the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nations.

APPENDIX B

Opinions and Judgment Below

Opinion of Pine, J., in *Arthur Schofield, et al.* v. *Ezra T. Benson, etc.* United States District Court for the District of Columbia, filed October 7, 1955.

In this case plaintiffs have filed an action against the Secretary of Agriculture. They are president and secretary-treasurer of the Central Massachusetts Dairy Association, a voluntary association of milk producers. They bring this action on behalf of themselves and the other members of their association, composed of 97 dairy farmers living in central Massachusetts.

The basis for their complaint may be summarized as follows:

As a result of petitions filed by the Maine Dairymen's Association, Northern Farmers' Cooperative, and the New England Milk Producers Association, hearings were held pursuant to notice by defendant. The petitioners referred to are cooperative associations of producers engaged in marketing milk and milk products and rendering services to their members. These petitions proposed amendments to the Federal marketing orders covering Boston and other areas of Massachusetts. One of the amendments proposed the extension of the Boston Area to include the towns of Framingham, Natick, Wayland, Weston, and others. These towns are supplied by members of the plaintiffs' association. At the hearing evidence was offered, and on July 29, through his deputy assistant, defendant published proposed findings and recommendations. One proposed to amend the Boston order by extending the milk marketing area to include these four towns. The findings in support of this recommendation, according to the complaint, are contrary to the evidence introduced at

the hearings, could not be made by a reasonable man on the evidence, and are arbitrary and capricious. Exceptions were taken to the findings and recommendations by the plaintiffs and by the Governor of Massachusetts, but on September 16, 1955, despite the exceptions, defendant published and proposed an amendment to the Boston order to include these towns. His decision substantially incorporates the proposed findings above referred to. The defendant further proposed to submit the amendment to a referendum of all producers supplying the Boston Area, as well as the producers supplying the four towns referred to, and to consider the approval of the New England Milk Producers' Association, the Maine Dairymen's Association, and the Northern Farmers' Cooperative as the approval of all their members.

The members of the plaintiffs' association are under the jurisdiction of the State Milk Control Commission of Massachusetts and are paid a price for their product substantially higher than prices paid in the marketing area now subject to the Federal order. Each of the members of plaintiffs' association will lose an average of $1,000 per year or a gross loss of $97,000 under the proposed amendment.

By the terms of the Agricultural Marketing Agreement Act, the referendum should be held among only the producers supplying the four towns, but it is claimed the referendum proposed by the defendant is contrary thereto and is but a sham and a mockery, for the reasons set forth in the complaint. Petitioners and the members of their association claim they will suffer serious and irreparable injury in addition to that above set forth and will be deprived of their property without due process of law unless the court issues injunctive relief.

They pray for a preliminary and permanent injunction against holding the referendum as well as for a restraining order.

Upon the presentation of their motion another judge of this court issued a restraining order and set the case down for hearing on a motion for preliminary injunction. Two days later, the parties entered into a stipulation by which they agreed that, until after argument and determination of the motion for preliminary injunction, defendant would not issue an order effectuating the amendment to the Federal Milk Order in question and plaintiffs would consent to the dissolution of the temporary restraining order without prejudice to the rights of either party to advance contentions respecting the illegality or legality of defendants' actions as set forth in the complaint. Thereafter the referendum which was already under way was completed.

Although the motion for preliminary injunction was to enjoin the referendum, the parties, by virtue of the stipulation, no longer have that issue pending, and have presented this motion on the basis of one to enjoin the Secretary from putting the order into effect, which defendant threatens to do. In this connection, it should be noted that there are many other provisions in the proposed order in relation to matters not herein complained of. These are not before the Court, and the injunctive relief sought herein is limited to the extension of the Boston Area to include the towns above referred to.

Defendant has filed a brief controverting all these charges, and there has been the usual battle of affidavits.

This was the state of the record when the matter came before me for hearing. At that time, however, plaintiffs filed an amendment to their complaint. By the amendment, plaintiffs questioned the constitutionality of the Agricultural Marketing Agreement Act of 1937 as amended, particularly Section 8(c) thereof (7 U. S. C. 608-c) and filed a request for a three-judge court under 28 U. S. C. 2282 and 2284. The former provides that an interlocutory or permanent injunction restraining the enforcement,

operation, or execution of any Act of Congress for repugnance to the Constitution shall not be granted by any district court or judge thereof unless the application is heard and determined by a district court of three judges. This amendment to the complaint therefor presents a threshold question which must first be determined and which I shall now discuss.

The Supreme Court has held that these sections of the Code are not applicable unless the question of constitutionality is substantial, and that it is the duty of the district court judge to scrutinize a bill of complaint to ascertain whether a substantial question of constitutional validity is presented before taking steps to convene a three-judge court. Water Service Co. v. Redding, 304 U. S. 252, 254. Jameson & Co. v. Morgenthau, 307 U. S. 171, 172. In this case, I find no substantial question of constitutional validity, as that issue was long since settled in the affirmative by the Supreme Court in United States v. Rock Royal Co-op., 307 U. S. 533. Accordingly I deny the request for a three-judge court, and proceed to consideration of the motion for a preliminary injunction.

At the hearing on this motion, the conflicting contentions of the parties above referred to were further pointed up by emphatic and unequivocal charges and denials by their respective counsel. It is probably an understatement when I say that they "minced no words." To decide the issues raised will require exhaustive study, with assistance of counsel, of what was described as a voluminous record. This characterication proved to be no exaggeration, because since submission of the motion, defendant has filed his answer, attached to which are purported copies of the hearings. These consist of five volumes the largest being more than three inches in thickness, containing thousands of pages of testimony, tabulations, maps, statistics, printed matter, etc.

When a motion for preliminary injunction is presented in advance of a hearing on the merits, the Court is called upon to exercise its discretion "upon the basis of a series of estimates: the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, the balancing of damage and convenience generally. A mere listing of the guiding considerations demonstrates their intangible nature, especially when no attempt is made at this stage to decide finally the questions raised." Perry v. Perry, 88 U. S. App. D. C. 337, quoting from concurring opinion in Communist Party v. McGrath, 96 F. Supp. 47, 48.

Upon consideration of the record, and aided by extensive argument of counsel, and applying the criteria above set forth, I am of the opinion that a preliminary injunction should be issued enjoining the defendant, until the case can be fully heard, from promulgating or making effective that *part* of his order extending the limits of the Greater Boston Marketing Area to include the towns of Framingham, Natick, Wayland, and Weston.

Counsel will submit, on notice, proposed order in accordance herewith and any further findings which they may deem necessary.

DAVID A. PINE,
Judge.

October 6, 1955.

Order Granting Preliminary Injunction

This cause came on for hearing on September 27, 1955, on Plaintiffs' motion for a temporary injunction, and upon consideration thereof and the verified complaint, as amended, and affidavits filed herein, the Court finds (A) that immediate and irreparable injury, loss, and damage will result to the Plaintiffs if the Defendant now promulgates and makes effective, as he has threatened to do, that part of his proposed amendatory order extending the limits of the Greater Boston Marketing Area to include the towns of Framingham, Natick, Wayland and Weston; (B) that such immediate, irreparable damage would include losses in their current operating income and other losses from the disrupting of their marketing procedure and production pattern; (C) that there is no evidence of any emergency requiring the immediate promulgation or making effective of the threatened amendment; (D) that if the threatened amendment is now promulgated and made effective, Plaintiffs will be remediless at law for their immediate financial loss of revenue and the loss in value of the property owned and used by them in their milk production and marketing business; (E) that the granting of this preliminary injunction will not irreparably injure Defendant or cause harm to the public; and (F) that unless this temporary injunction issues any order or judgment which this Court may later make on Plaintiffs' application for a permanent injunction will be ineffective and would not compensate them adequately for the income and capital losses they would suffer if this temporary injunction was denied; and the Court, after due consideration and upon a balancing of the conflicting interests and equities herein, being of the opinion that there is a reasonable probability Plaintiffs may ultimately succeed and prevail herein and that Plaintiffs are entitled to a preliminary injunction as prayed, it is

ORDERED that the Defendant, his agents, servants, employees, attorneys and all persons in active concert or participation with him be and hereby are enjoined from promulating or making effective that part of his proposed order extending the limits of the Greater Boston Marketing Area to include the towns of Framingham, Wayland, Natick and Weston; and It Is Further

ORDERED that this temporary injunction remain in effect until the further order of this Court; PROVIDED, that the security in the sum of One Thousand Dollars ($1,000.00) Given by Plaintiffs upon the issuance of the temporary restraining order heretofore issued herein be continued during the pendency of this action.

Dated: October 21st, 1955

/s/ DAVID A. PINE
Judge

Agreed and consented to by Nat. Surety Corp., as surety.

/s/ JOHN J. RILEY
Atty. in Fact

Opinion of Pine, J., in *Arthur Schofield, et al.*, v. *Ezra T. Benson, etc.*, United States District Court for the District of Columbia, delivered from the Bench, and contained in Transcript of Proceedings of October 20-21, 1955 (R. 288-290).

PROCEEDINGS

The Court: This matter was originally argued before me last September. I took it under advisement, gave it very careful consideration and I finally concluded that a preliminary injunction should issue, and wrote a memorandum opinion on the point.

Thereafter, there were motions of various kinds filed, which is characteristic of this case, and among others,

there was a motion for me to sign a judgment to carry my opinion into effect.

There was also filed a motion by which the defendant proposed an alternative, that is, that the Milk Marketing Order be allowed to go into effect and that the money be escrowed by impounding, pending final decision, that is, the money differential between the Class 1 price and the blended price, which the 96-odd producers claim they stand to lose if the order is allowed to go into effect.

This had an appealing tone, and at first blush it seemed to be equitable, but on reflection, I believe its equity is more theoretical than real. To be sure, the 12,000, approximately 12,000 producers would be benefited apparently to the extent of approximately $180,000, the difference being made up by Hood and other handlers of unregulated milk, aside from the plaintiffs. The plaintiffs would stand to lose approximately $97,000 per annum in both cases, but that is not the whole story. The loss to the 12,000 handlers who are seeking this order, if spread among them, would be approximately $15 per annum each, while the loss to the plaintiffs, if spread among them, would be approximately $1,000 per annum each, speaking in averages. Of course, those benefited by the order would irretrievably lose the $15 per annum if the order is enjoined and, theoretically, under the proposed amendment the plaintiffs would be able to recover approximately $1,000 per annum if they prevailed. But again, that is more theoretical than real because the file discloses that the $1,000 loss per farmer per year would, in many cases, be destructive or disruptive of their businesses and their method of doing business, so that in that case the $1,000 per annum would also not only be irretrievably lost but the farmer would be put out of business.

I can't believe that equity demands that plaintiffs' irretrievable loss of an average of $15 per annum on the one side outweighs the consideration of the $1,000 per

annum per farmer on the other side, and the threatened death-knell of their enterprises.

Equity deals with more than total volumes of money; it deals with human beings as well when their property rights and financial interest and very livelihood are involved.

Now, the defendant feels that Hood & Company is the villian in the piece, and that that company, colloquially speaking, is getting a free ride. I do not believe that is justification for the ruination of these small farmers, so the motion to modify will be denied.

Opinion, in *Ezra T. Benson, etc., Appellant* v. *Arthur Schofield, et al.* United States Court of Appeals for the District of Columbia Circuit, June 29, 1956. Before Washington, Danaher and Bastian, Circuit Judges.

DANAHER, *Circuit Judge:* Appellees as officials of a voluntary association of Massachusetts milk producers [1] sought, and the District Court granted, a preliminary injunction which enjoins and restrains the Secretary of Agriculture from promulgating or making effective that part of his proposed order which would extend the limits of the Greater Boston Marketing Area to reach and include milk distributed and sold in certain named towns. Proceedings with respect to proposed amendments to the present order [2] had gone forward in accordance with the applicable rules of practice and procedure,[3] public hearings had been held and a referendum had been conducted. Before the Secretary could promulgate his findings and

[1] The association is known as Central Massachusetts Milk Producers' Association comprised of some 97 milk producers who market their milk in the towns of Framingham, Natick, Wayland and Weston which are proposed to be added to the Greater Boston Marketing Area.

[2] Milk Order No. 4, 7 C.F.R. 904 (1955).

[3] 7 C.F.R. 900 (1955).

issue his order with respect to the proposed amendments, this action was commenced. Appellants assert that the trial court erred in granting the preliminary injunction in that the District Court lacked jurisdiction because (1) the action was premature, (2) appellees lack standing and (3) the statutory plan prohibits the suspension of orders pending judicial review. Additionally, appellants insist that the preliminary injunction was improperly granted in that there was a failure to make the required findings of fact and conclusions of law, and in that, without regard to the public interest, it was erroneously assumed that appellees had established that they were likely to prevail.

The District Court concluded that no substantial constitutional question was presented in view of *U. S.* v. *Rock Royal CO-OP*, 307 U.S. 533 (1939). We may assume the validity of the statute, 7 U.S.C. § 608c (1952).

It is common knowledge that the production and marketing of milk are vital and that the problems of the industry have long engaged the notice of the Congress, the state legislatures and the courts. Citations to the numerous source references are here unnecessary. It is sufficient to point up our present problem that a few general observations be made. Since there are daily fluctuations in the demand as well as periodic and seasonal fluctuations in supply, even flow and equal distribution of available fluid milk are impossible of achievement. The quantities of fluid milk required to meet normal daily demands in an off-season, as a measure of normal need, may be vastly exceeded by large surpluses in full production periods. Such surpluses, because milk is highly perishable, are the bane of the industry. The Boston Milk Order[4] provides for two minimum price

[4] *Supra* note 2; and see H. P. Hood & Sons v. U.S., 307 U.S. 588, 593-94 (1939), for a description of the "blended" or weighted average price plan.

classifications: Class I milk which includes fluid milk and certain fluid milk products, and Class II milk which includes quantities in excess of what is required to meet current demands for fluid milk as a food beverage, which surplus here includes all other milk products such as butter, cheese, milk powder and similar items.

Fluid milk as a food beverage commands a much higher price than quantities which may not be so consumed and which must be utilized in other categories. It is natural that an individual producer will seek to sell advantageously his more profitable fluid milk.[5] Still the public interest in an assured "normal" supply, as well as a proper concern for the economic status of all needed producers, as related to the economy as a whole, caused Congress to direct its attention to the complexities of the milk industry as treated in the Agricultural Marketing Agreement Act of 1937.[6]

To effectuate the purposes of the Act,[7] including an equitable distribution of the burden of surplus milk, the Secretary of Agriculture has been given power in certain circumstances to issue orders which are applicable, not to producers or retailers, but to producers as handlers.[8] Here the Secretary acted pursuant to the statu-

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[5] Appellees here sold all but 3% of their milk at Class I rates although the industry must carry a daily supply of 15% to 20%. Boston "obtains about 90% of its fluid milk from states other than Massachusetts." Hood & Sons v. Du Mond, 336 U.S. 525, 526 (1949).

[6] 50 STAT. 246, as amended, 7 U.S.C. §§ 601-659 (1952); some understanding of the intricacies of the problems may be gleaned from U.S. v. Rock Royal Co-op, 307 U.S. 533 (1939) and Nebbia v. New York, 291 U.S. 502 (1934).

[7] 7 U.S.C. § 608b (1952).

[8] As defined in § 608c of the Act, which includes associations of producers.

tory plan, but the authorized Order has not been issued since it must be predicated upon findings to be made by the Secretary,[9] which he was here prevented from making because of the assailed injunction.

The order of the District Court must be reversed for reasons we shall state.

Aside from the fact that the Secretary's order has not been issued, and may never be issued, and that, accordingly, the complaint is premature,[10] there would be scant gain if we chose to rest on that ground. Allowing the Secretary to complete his function under the Act, assuming he might make the required findings, would simply result in his doing so, whereupon, it may be supposed his order would be freshly attacked in a similar proceeding. Plain waste of time, effort and money plus possibly continued thwarting of the effectiveness of the legislative and administrative scheme would merely add up to frustration, surely not an end result to be encouraged by the action of the courts. For like reasons we pass over the point that the District Court failed to make the findings of fact and conclusions of law upon which the injunction was based.[11] A remand on that score would advance nothing.

Rather, we conclude that this action may not be maintained at all.

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[9] 7 U.S.C. § 608c (9); and see H. P. Hood & Sons v. U.S., 307 U.S. 588 (1939).

[10] United Air Lines v. Civil Aeronautics Board, —— U.S. App. D.C. ——, 228 F. 2d 13, 15-16 (D.C. Cir. 1955) and cases cited.

[11] Pub. Serv. Comm'n v. Wis. Tel. Co., 289 U.S. 67 (1933); Mayo v. Canning Co., 309 U.S. 310, 319 (1940).

In the first place, so far as handlers [12] are concerned, including producers as handlers, the Act expressly provides that when the Secretary has promulgated his order, it becomes "final, if in accordance with law" [13] subject to review only as the Act provides.[14] Even then, upon such review, if there has been error, the court must remand for proceedings "in accordance with law," and the pendency of proceedings under the subsection noted "shall not impede, hinder, or delay the United States or the Secretary . . . from obtaining relief . . . ." as provided in § 608a(6). There is no provision authorizing interference with the administrative plan. When we have in mind the purposes of the legislation, it is difficult to see how Congress in these respects could more effectively have expressed its will than is evident from a mere reading of the Act. If appellees were to be deemed handlers, they would be bound by the administrative remedy and the judicial review provisions of the Act. Appellees, viewed as producers, being unregulated, are given by the Act no greater status than the handlers who are regulated.

In the second place, appellees "to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law." [15] Mere loss of income in consequence of the action of Government

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[12] According to the complaint, appellee Schofield is President and appellee Adams is Secretary-Treasurer of Central Massachusetts Dairy Association, a voluntary association of milk producers. The action was commenced by the named appellees in "behalf of themselves and the other members of the Association who are similarly situated and of whom they are fairly representative." See 7 U.S.C. § 608c.

[13] 7 U.S.C. § 608c(15)(A).

[14] 7 U.S.C. § 608c(15)(B). As to circumstances under which other relief may be available, see Stark v. Wickard, 321 U.S. 288, 308 (1944).

[15] Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940).

or economic disadvantage, by itself, constitutes *damnum absque injuria* which does not confer standing.[16] Moreover, there is no certainty of any such loss, for Milk Order No. 4 prescribes merely minimum prices. Appellees realize fully that all this is so, as their amended complaint and their brief make clear.

They argue accordingly that they derive standing because of a deprivation of the benefit of the provisions[17] of the Act entitling them to notice of and to attend hearings and because of the manner in which the Secretary conducted the required referendum. The denial of such rights is said to stem from a decision and findings lacking substantial support in the evidence and from a referendum which was unfair. In the trial court, appellees' counsel expressly conceded the findings which related to the proximity of the subject area "to Boston, to the transportation improvements, to the growth in population" of the affected towns. While challenging in argument yet other findings, appellees point to no portion of the hearings lacking in substantial evidence to support such findings. Absent a demonstration that the Secretary's action was in fact arbitrary, as alleged, we cannot deny a presumption of its validity.[18] Moreover, the record makes indisputably clear that the Secretary acted, so far as he has been permitted to act, only after notice and public hearings in which all interested parties, including appellees, were participants, either in person or through counsel or both. We cannot doubt the validity of the findings.

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[16] Kansas City Power & Light Co. v. McKay, 96 U.S. App. D.C. 273, 225 F. 2d 924, 934 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 884 (1955); United Milk Producers of New Jersey v. Benson, 96 U.S. App. D.C. 227, 225 F. 2d 527 (D.C. Cir. 1955); and see generally, Stark v. Wickard, 321 U.S. 288 (1944).

[17] 7 U.S.C. § 608c(3), 608c(8), 608c(9).

[18] Pacific States Co. v. White, 296 U.S. 176, 185-86 (1935).

Appellees beam their fire at the manner in which the referendum was conducted, particularly as to the voting plan. They seem to argue that voting must be limited to the local farmers and the suppliers of two handlers in the four towns proposed to be added to the Boston Milk Marketing Area. The short answer is that the Act contains no such requirement. The agent of the Secretary designated to conduct the referendum among the producers [19] supplied for the record a detailed account of the procedure followed, comporting both with the requirements of and as permitted by the Act.[20] We find no substance in this line of attack.

Referring further to the statutory rights already mentioned above, appellees finally urge ". . . since they allege that they have been deprived of those rights it cannot be argued that they have suffered no legal wrong." After thus beating the cow around the barn, appellees claim standing to vindicate a "legal wrong" because of language to be found in *Stark* v. *Wickard*.[21] But there the Court pointed out: "It is because every dollar of deduction comes from the producer that he may challenge the use of the fund. The petitioners' complaint is not that their blended price is too low, but that the blended price has been reduced by a misapplication of money deducted from the producers' minimum price." [22] We still come back to the proposition, as the *Stark* case points out,[23] that absent "*justiciable individual* rights," (italics ours) the detriment complained of is *damnum*

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[19] As defined in Milk Order No. 4, as amended, and as proposed to be amended.

[20] Cf. H. P. Hood & Sons v. U. S., *supra* note 4, 307 U.S. at 597-99.

[21] 321 U.S. 288 (1944).

[22] *Id.* at 308-9.

[23] *Id.* at 310.

absque injuria.[24] In short, the public interest is paramount.

> "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." [25]

Here the Secretary has made the public interest findings contemplated by the Act. Even consumers as such have only a general interest in the execution of the law, and as previously noted, the proposed order by the very terms of the Act shall not be applicable to any producer in his capacity as such. Since it is clear that Congress has not "intended to create a statutory privilege protected by judicial remedies," [26] appellees lack a legal right. For the reasons given, they have demonstrated no legal wrong.[27]

It follows, we conclude, that the complaint should have been dismissed. The order of the District Court is reversed, and the case is remanded for further proceedings conformably to the views herein expressed.

Reversed and remanded.

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[24] *Id.* at 304; here was no "deduction of a sum to pay the United States a sales tax on milk sold." *Id.* at 303.

[25] Munn v. Illinois, 94 U.S. 113, 126 (1877).

[26] Stark v. Wickard, *supra* note 14, 321 U.S. at 306.

[27] Cf. Tennessee Power Co. v. T.V.A., 306 U.S. 118, 140 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464, 479 (1938).

Judgment

These cases came on to be heard on the record from the United States District Court for the District of Columbia, and were argued by counsel.

On Consideration Whereof, It is ordered and adjudged by this Court that the order of the said District Court appealed from in these cases be, and the same is hereby, reversed, and that these cases be, and the same are hereby, remanded to the said District Court for further proceedings conformably to the views expressed in the opinion of this Court.

It is further Ordered by the Court that in Case No. 13,128 the New England Milk Producers' Association, et al., recover against Arthur Schofield, et al., their docket fee and the cost of printing their briefs in Case No. 13,128, and the cost of printing their share of the joint appendix in these cases, and have execution therefor.

Per Circuit Judge Danaher.

Dated: June 29, 1956.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
1. The economic and statutory background	2
2. The administrative proceeding in this case	6
3. The judicial proceedings below	8
(a) In the District Court	8
(b) In the Court of Appeals	10
Argument	12
Conclusion	20
Appendix	21

CITATIONS

Cases:

Adams v. *Nagle*, 303 U. S. 532	17
Associated Industries v. *Ickes*, 134 F. 2d 694, vacated as moot, 320 U. S. 707	15
Baldwin v. *G. A. F. Seelig*, 294 U. S. 511	5
Barns v. *Dairymen's League Co-op. Ass'n, Inc.*, 220 App. Div. 624	4
Dyer v. *Gallagher*, 203 F. 2d 477	17
Hegeman Farms Corp. v. *Baldwin*, 293 U. S. 163	17
H. P. Hood & Sons v. *DuMond*, 336 U. S. 525	3, 5
H. P. Hood & Sons v. *United States*, 307 U. S. 588	5, 7, 20
Kansas City Power & Light Co. v. *McKay*, 225 F. 2d 924, certiorari denied, 350 U. S. 884	13, 15
Nebbia v. *New York*, 291 U. S. 502	3, 17
Noyes v. *Rock Royal Co-op. Inc.*, Supreme Court of the United States, October Term, 1938, No. 826	5
Pacific States Co. v. *White*, 296 U. S. 176	16, 17
Perkins v. *Lukens Steel Co.*, 310 U. S. 113	13
Silberschein v. *United States*, 266 U. S. 221	17
Stark v. *Wickard*, 321 U. S. 288	13, 15–16, 19
Tennessee Power Co. v. *Tennessee Valley Authority*, 306 U. S. 118	13

412078—56——1

Cases—Continued Page

United Milk Producers of New Jersey v. *Benson*, 225 F. 2d 527 ..... 13, 15

United States v. *Rock Royal Co-op.*, 307 U. S. 533 ..... 3, 4, 5, 10, 16, 17, 19, 20

United States v. *Ruzicka*, 329 U. S. 287 2

Statutes:

Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, *et seq.*:

Section 4 (c) 11

Section 10 (a) 12, 14

Agricultural Adjustment Act, Section 8 (3), 48 Stat. 34–35 5

Agricultural Adjustment Act Amendments of 1935, Section 5, 49 Stat. 753 5

Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U. S. C. 601, *et seq.*:

7 U. S. C. 601 21

7 U. S. C. 602 21

7 U. S. C. 608c (1) 5, 22

7 U. S. C. 608c (3) 6, 23

7 U. S. C. 608c (4) 23

7 U. S. C. 608c (5) 23

7 U. S. C. 608c (8) 24

7 U. S. C. 608c (9) 6, 24

7 U. S. C. 608c (9) (B) (i) 6, 25

7 U. S. C. 608c (12) 6, 26

7 U. S. C. 608c (13) 13, 16, 26

7 U. S. C. 608c (13) (B) 27

7 U. S. C. 608c (15) 15, 27

7 U. S. C. 608c (19) 6, 28

7 U. S. C. 610 28

Miscellaneous:

Federal Rules of Civil Procedure, Rule 52 10

Milk Order No. 4 (7 CFR, Part 904) 7

7 CFR 904.4 (a) 18

7 CFR 904.4 (b) 18

7 CFR 904.15 18

Order of the Secretary of Agriculture dated October 18, 1956, 21 F. R. 8131, 8132 ..... 11, 12, 19

Study of the Dairy Industry, Hearings before the Subcommittee on Dairy Products of the Committee on Agriculture, House of Representatives, 84th Cong., 1st Sess., p. 183 17

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 595

ARTHUR SCHOFIELD, ET AL., PETITIONERS

v.

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, AND NEW ENGLAND MILK PRODUCERS' ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF AGRICULTURE IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court dated October 7, 1955 (Pet. 41–45), and the court's oral statement of October 21, 1955 (Pet. 47–49) have not been reported. The opinion of the Court of Appeals (Pet. 49–56) is reported at 236 F. 2d 719.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1956 (Pet. 57). A timely motion for rehearing in banc was denied on September 11, 1956. The petition for a writ of certiorari was filed on

November 26, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

An Order of the Secretary of Agriculture under the Agricultural Marketing Agreement Act enlarges the Greater Boston (Milk) Marketing Area so as to include the area for which petitioners produce milk. The questions presented are:

1. Whether, in the absence of the invasion of a legal right, the allegation of an expected financial loss confers standing on petitioners to challenge the validity of the Order.

2. Whether, even assuming *arguendo* that petitioners had standing, the court below erred in holding that petitioners' attack on the Order is without substance.

STATUTE INVOLVED

The pertinent provision of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U. S. C. 601, *et seq.*, are set forth in the Appendix, *infra*, pp. 21–29.

STATEMENT

1. THE ECONOMIC AND STATUTORY BACKGROUND

The petition in this case seeks to raise issues connected with the regulation of the milk industry. As this Court has stated, such issues are "entwined with factors that call for understanding of the milk industry," [1] the economy of which "is so eccentric that

[1] *United States* v. *Ruzicka*, 329 U. S. 287, 294.

economic controls have been found at once necessary and difficult."[2] The factors which render such regulation imperative have been explained in detail by this Court in *Nebbia* v. *New York*, 291 U. S. 502, 516–518, and *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 549–550, and will be dealt with only briefly here.

Since milk is an essential element of diet, and in particular of young infants, the public interest requires a constant adequate supply of wholesome milk. The demand and supply of milk, however, are subject to sharp variations. Apart from considerable fluctuations in the daily demand of milk, there are seasonal cycles in the supply, as the result of which there is nearly twice as much milk available in June as there is in November. Storage of the excess supply to meet a later peak in demand, however, is not possible in view of the highly perishable nature of milk.[3]

This surplus milk, *i. e.*, the milk which exceeds the current demand for fluid milk as a food beverage, can be utilized in the production of cream, butter, cheese, milk powder, and similar items. For those purposes, however, it can be sold only at a greatly reduced price. Consequently, all producers compete most eagerly for the more profitable fluid milk market. The resulting cut-throat competition readily engenders business

[2] *H. P. Hood & Sons* v. *DuMond*, 336 U. S. 525, 529.

[3] Thus, in order to insure satisfaction of the daily demand, the milk industry must carry a surplus of about 20% (*Nebbia* v. *New York*, 291 U. S. 502, 517); a supply sufficient to meet the needs in November necessitates a surplus of more than 50% during the flush season in June.

practices which jeopardize "the quality and in the end the quantity"[4] of the vital fluid milk supply.

The principal problem therefore is to find a method by which the burden of the surplus milk may be borne equitably by the entire industry, *i. e.*, by all the producers and the handlers (distributors) of the milk. One method designed to achieve this end was first developed by cooperatives. Under this plan, the cooperative would sell its members' milk for a variety of uses and at a variety of prices, place the proceeds into a single fund, and pay each member on an equal basis according to the quantity of milk supplied by him, not according to the purposes to which his milk has been used. By this method of "blending" the price, the burden of surplus milk is spread evenly over all the members of the cooperative.[5] The inherent weakness of this system is that an individual dairy farmer who refuses to join the cooperative can profitably escape assuming his share in the surplus milk burden by selling all his milk to a distributor at a price lower than the cooperative's price for fluid milk but higher than the blended price received by the cooperative farmers.

State legislation passed during the depression to give statutory sanction to the blended price method was found to be constitutional in *Nebbia* v. *New York*, 291 U. S. 502. State control of the milk industry, however, had one serious deficiency. Much of the milk consumed in the large metropolitan centers

[4] *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 550.

[5] Cf. *Barns* v. *Dairymen's League Co-op. Ass'n, Inc.*, 220 App. Div. 624, 630.

moves in interstate commerce [6] and the States lack the power to prevent the importation of unregulated milk. *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511.

Congress thereupon entered the field—first under the Agricultural Adjustment Act Amendments of 1935, Section 5 (49 Stat. 753), and now under the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), as amended—to deal with the problem, which co-operatives and state regulation had been unable to solve.[7] The regulatory plan of the statute, described and held constitutional in *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, and *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, authorizes the Secretary of Agriculture to issue Orders designed to effectuate the declared policy of the Act, 7 U. S. C. 608c (1) *infra*, pp. 22–23.[8] Such orders are applicable to handlers,[9] but not to producers in the capacity of pro-

[6] The City of Boston obtains about 90% of its fluid milk from States other than Massachusetts. *H. P. Hood & Sons* v. *DuMond*, 336 U. S. 525, 526. Only 70% of the milk of the New York City metropolitan area originates in New York State. *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, 519.

[7] Shortly after the decision in *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, the States of New York, New Jersey, Pensylvania, Maryland, Massachusetts, Vermont, and Connecticut petitioned the Secretary of Agriculture that he exercise his licensing powers under Section 8 (3) of the Agricultural Adjustment Act (48 Stat. 34–35) to regulate milk moving in interstate commerce. See Brief for Appellant, pp. 17–18, in *Noyes* v. *Rock Royal Co-op. Inc.*, Supreme Court of the United States, October Term, 1938, No. 826.

[8] In view of the many amendments of the basic statute, we refer to the text as found in Title 7 of the United States Code. For the pertinent provisions of the Act, see *infra*, pp. 21–29.

[9] "Handlers" as defined in 7 U. S. C. 608c (1) (App., *infra*, pp. 22–23) are processors, associations of producers, and others engaged in the handling of certain agricultural commodities, including milk.

ducers (7 U. S. C. 608c (13), *infra,* pp. 26–27). Among other provisions of the Act, a handler covered by such an order is forbidden from paying less than a minimum price designated in the order, but there is nothing to prevent him from paying more.

A prerequisite to issuance of an order under the Act is a hearing conducted by the Secretary (7 U. S. C. 608c (3), *infra,* p. 23). After the hearing, a majority of the handlers affected may sign a marketing agreement concerning that commodity (7 U. S. C. 608c (8), *infra,* p. 24). If they fail to do so, the Secretary may issue an order if the two following conditions, set forth in 7 U. S. C. 608c (9) (*infra,* pp. 24–26) are met. First, the proposed order must be submitted to a referendum of the producers supplying the marketing area specified in the order. In such referendum, the approval of a co-operative is considered to constitute the approval or disapproval of its members (7 U. S. C. 608c (9), B (i); (12); (19), *infra,* pp. 25–26, 26, 28). Second, the Secretary must make two findings: (a) that the failure of the necessary majority of the handlers to sign a marketing agreement tends to prevent the effectuation of the declared policy of the Act; and (b) that the issuance of the Order is the only practical means of advancing the interest of the producers pursuant to the declared policy of the Act and that it has been approved by the required majority of such producers (7 U. S. C. 608c (9), *infra,* pp. 24–26).

2. THE ADMINISTRATIVE PROCEEDING IN THIS CASE

In the spring of 1955, extended hearings were held on a number of proposals to amend the orders regu-

lating the handling of milk in four Massachusetts marketing areas. The amendment here involved proposed that the Greater Boston Marketing Area covered by Milk Order No. 4 (7 CFR, Part 904, R. 703–746) [10] be expanded so as to include seven suburban communities which had become urbanized in varying degrees. On the basis of those hearings, the Deputy Administrator filed a "recommended decision" (R. 13–20) which proposed that four of those towns (*viz,* Framingham, Natick, Wayland, and Weston) be included in the Greater Boston Marketing Area. Exceptions filed against this recommended decision were overruled on September 13, 1955, by the Acting Secretary of Agriculture (R. 27–61), who concluded that the four towns should be included in the Greater Boston Marketing Area, and directed that a referendum be conducted among the producers of the Greater Boston Marketing Area, as then constituted, as well as in the four towns proposed to be added to it (R. 60–61).

According to the pertinent findings of the Secretary, the four towns had become a part of the Boston suburban area and were engaged in a process of rapid urbanization. Framingham and Natick, in particular, were "experiencing a very dynamic transition to an intensive residential and industrial area" (R. 29–30). Since local milk production in the area could supply only a small part of the total fluid milk supply of the area, local producers (including petitioners in the instant case) were able to sell all their milk as

[10] The basic parts of Milk Order No. 4 were discussed and held valid in *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 593–594.

fluid milk, and local dealers obtained a large portion of their fluid milk requirements from unregulated sources (*i. e.*, New Hampshire and Vermont) and particularly from the Greater Boston Marketing Area (R. 32).

The Acting Secretary further found that (R. 32–33):

> All producers having a bona fide association with the fluid milk market should share equitably in the proceeds from sales in the market. The present pooling and pricing scheme under the Boston order will promote this principle.

and that (R. 60):

> The proposed marketing agreements and the orders, now in effect, and as hereby proposed to be amended, and all of the terms and conditions thereof will tend to effectuate the declared policy of the act.

As directed by the decision of the Acting Secretary (R. 60–61), the local marketing agent mailed out ballots on September 16, 1955, advising the recipient that if their votes were to be counted they would have to be received or postmarked not later than September 23, 1955 (R. 83, 77–79).

3. THE JUDICIAL PROCEEDINGS BELOW

(*a*) *In the District Court.*—On September 19, 1955, in the District Court for the District of Columbia, petitioners, alleging to be (or to act for) milk producers located in the four-town area, filed a complaint (R. 7–12) in which they attacked the Secretary's findings as arbitrary, capricious, and contrary to the evidence, and claimed that the submission of the refer-

endum to all the producers supplying the Greater Boston Marketing Area was improper. Petitioners set forth that the minimum prices they presently received were regulated by state law, and alleged upon information and belief that, if the Boston Order were extended to the four-town area, they would lose 50¢ on each hundred-weight of milk (which would constitute an average annual loss of $1,000 for each of the 97 producers located in the four-town area), because of the lower minimum price designated in the Boston Order. The complaint asked for permanent and interlocutory relief enjoining the completion of the referendum and for the judicial review of the administrative proceeding (R. 11–12).

A temporary restraining order granted at the time of the filing of the complaint, which enjoined respondent from conducting, consummating, or effectuating the referendum (R. 70–71), was vacated on September 21, 1955 (R. 73–74), on the basis of a stipulation pursuant to which respondent agreed not to issue the Order until after the argument and determination of petitioners' motion for a preliminary injunction (R. 73). A preliminary tabulation of the votes disclosed that the proposed Order was approved by a vote of 9,698 to 107. The vote of the producers covered in the original Greater Boston Marketing Area was 9,258 to 61; producers supplying the four-town area, but not Boston, favored it 440 to 46 (R. 83–84). In view of the completion of the referendum, petitioners amended their complaint asking for a preliminary injunction restraining respondent from amending the Boston Order so as to include the four towns in

the Greater Boston Marketing Area. The amended complaint also alleged that the Agricultural Marketing Agreement Act was unconstitutional (R. 81–82).

After a hearing, in which petitioners' counsel conceded that the findings of the proposed Order were sufficient (R. 177–178) but contended that they constituted "a tissue of falsehood" (R. 179), the District Court rejected petitioners' contentions regarding the constitutionality of the Agricultural Marketing Agreement Act. It recognized that this issue had long been settled by this Court in *United States* v. *Rock Royal Co-op.*, 307 U. S. 533 (Pet. 44). The court, however, concluded that petitioners were entitled to a preliminary injunction.[11] However, neither the injunction order (Pet. 46), nor the memorandum opinion of October 6, 1955 (Pet. 41–45), nor the court's oral statement of October 21, 1955 (Pet. 47–49), contained any findings of the fact nor any specific conclusions of law which set forth the grounds for the court's action (Rule 52, Federal Rules of Civil Procedure).

(*b*) *In the Court of Appeals.*—The Court of Appeals, in its opinion of June 29, 1956, reversed the order of the District Court and remanded the case with instructions to dismiss the complaint (Pet. 49–56). It held that the injunction had to be dissolved because the complaint had been filed prematurely, *i. e.*, before an administrative order had been issued, and because

[11] In issuing the preliminary injunction, the District Court remarked that its action was based in part "[u]pon consideration of the record" (Pet. 45). However, the opinion makes clear that the reference could not have been to the administrative record, which had been brought before the court by counsel for the Secretary (Pet. 44).

the District Court had failed to make the required findings of fact and conclusions of law (Pet. 52).

The court, however, concluded that a remand to supply the required findings and conclusions, or a reversal on the ground that the complaint had been filed prematurely, would result in "[p]lain waste of time, effort and money plus possibly continued thwarting of the effectiveness of the legislative and administrative scheme" and decided to make a final determination of this litigation. It held that petitioners lacked standing to sue because the wrong of which they complained constituted merely an economic disadvantage, not the invasion of any legally protected rights. In this connection, the court determined that the two specific grounds on the basis of which petitioners attacked the proposed Order (*supra*, pp. 8–9) were untenable. It held that the selection of the producers authorized to vote in the referendum complied with the statutory requirements (Pet. 55), and that there was not any substance to petitioners' basic allegation that the Order was arbitrary, capricious, and unsupported by substantial evidence (Pet. 54).

A petition for rehearing in banc was denied without any noted dissent. Motions for a stay of the mandate were denied by the Court of Appeals and by Mr. Chief Justice Warren. The Secretary of Agriculture thereupon issued the Order on October 18, 1956, to be effective November 1, 1956 (21 F. R. 8131). In view of Section 4 (c) of the Administrative Procedure Act,[12] which requires that in the absence of good cause

[12] 60 Stat. 238, 5 U. S. C. 1003 (c).

found by the agency an interval of thirty days has to elapse between the publication of an order in the Federal Register [13] and its effective date, the Order recited that its issuance had been delayed by nearly a year as the result of the preliminary injunction obtained by petitioners and found specifically that (21 F. R. 8132):

> The delay in the issuance of this order has already seriously impaired the orderly marketing of milk in the marketing area, and any further delay beyond November 1, 1956, in making the order effective will substantially obstruct the effectuation of the declared policy of the act.

ARGUMENT

The history of this case, we submit, demonstrates that further review is not warranted. Moreover, as we shall show presently, the ruling below is in full accord with controlling precedent, and there is no merit to petitioners' attack on the Secretary's Order.

1. The court below properly held that petitioners, as milk producers, have no standing to seek review of the extension of the Greater Boston Marketing Area to the four towns. Petitioners are not suffering any legal wrong, nor are they adversely affected or aggrieved within the meaning of any relevant statute. Administrative Procedure Act, Section 10 (a).

(*a*) *Petitioners have not suffered any legal wrong.*— By its own terms, the statute has no application to petitioners in their capacities as producers; it applies

[13] The Order was published in the Federal Register of October 24, 1956.

only to handlers.[14] Petitioners themselves concede that the Order does not regulate them directly. They allege, however, that the Order prejudices them because the *minimum* price payable to them by the handlers under the federal Order is lower than the price they have been receiving under Massachusetts regulation. Yet, the Order does not prevent any handler from continuing to pay petitioners at the higher Massachusetts rate.[15] Conversely, if the Order were not extended to the four towns, petitioners still would have no assurance that they would remain covered by the state statute. Federal regulation would become applicable whenever a handler decides to sell petitioners' milk to areas under federal orders (*e. g.*, Boston and Worcester).

While it may be true that there is a possibility of economic disadvantage to petitioners, such disadvantage does not constitute a legal wrong. *Tennessee Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113; *United Milk Producers of New Jersey* v. *Benson*, 225 F. 2d 527 (C. A. D. C.); *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (C. A. D. C.), certiorari denied, 350 U. S. 884. As this Court pointed out in *Stark* v. *Wickard*, 321 U. S. 288, 304, 308–309, standing to attack a milk order requires more than the mere claim that the order is detrimental, or that the blended price is too low. It presupposes the actual invasion of a specific interest, personal to the plaintiff. There, the blended milk price

[14] *Supra*, pp. 5–6; cf. 7 U. S. C. 608c (13) (B), *infra*, pp. 26–27.
[15] *Stark* v. *Wickard*, 321 U. S. 288, 291; see also R. 359.

had been reduced by a misapplication of the funds actually belonging to producers. Here, petitioners merely allege that the Order would result in a decrease of their income.[16] They do not set forth any diversion of any funds properly belonging to them or any other invasion of a personal right.

(*b*) ***Petitioners are not adversely affected or aggrieved within the meaning of the Agricultural Marketing Agreement Act or any other statute.***—Although petitioners have not suffered any legal wrong, it might be argued that they are adversely affected or aggrieved by the Order in a general way. This, however, by itself is not enough to confer upon them a standing to sue. Section 10 (a) of the Administrative Procedure Act does not open the door to judicial review to everyone adversely affected or aggrieved by agency action but only to those who are "adversely affected or

[16] There is no merit to petitioners' statement that the District Court made a finding to the effect that the Order would not only cause a loss of income to petitioners but would force them completely out of business. As a matter of fact, the District Court did not make any formal findings of fact and conclusions of law (*supra*, p. 10). And the written memorandum opinion of October 7, 1955 (Pet. App. 41–45), is silent on the issue. The court's remarks upon which petitioners rely are to be found in an oral informal statement of the court (Pet. 47–49, R. 288–290). The alleged "finding" is based exclusively upon unsupported assertions of petitioners' counsel during the argument concerning the practicability of an escrow arrangement (R. 257–259). It finds no support in the pleadings (the complaint merely alleges an average annual loss of $1,000), nor in the affidavits submitted by petitioners (R. 88–95; but cf. R. 94–95). Indeed, petitioners' counsel conceded that there was no pertinent evidence on the point in the record and merely "suggested" that the escrow arrangement might "drive some, if not many, of these people out of business" (R. 259).

aggrieved by such action *within the meaning of any relevant statute.*" The italicized words are crucial and, of course, cannot be deleted. See, *e. g., Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924, 934 (C. A. D. C.), certiorari denied, 350 U. S. 884.

The question whether or not a person is adversely affected within the meaning of a statute depends on the general statutory plan. In many instances, it may be inferred from its review provisions. Thus a person who may seek review is generally considered aggrieved or affected within the meaning of the statute. It is significant that all the decisions cited by petitioners in this connection (Pet. 11) arose under the Federal Communications Act, the Federal Food, Drug, and Cosmetics Act, the Hatch Act, and the Bituminous Coal Act, all of which permit review by parties "aggrieved" or "adversely affected". In the absence of a special statutory provision authorizing judicial review, however, a person who is merely economically affected by agency action has no standing to challenge the latter. *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924, 934 (C. A. D. C.), certiorari denied, 350 U. S. 884; *United Milk Producers of New Jersey* v. *Benson,* 225 F. 2d 527, 529 (C. A. D. C.); *Associated Industries* v. *Ickes,* 134 F. 2d 694, 702 (C. A. 2), vacated as moot, 320 U. S. 707.

The review provisions of the Agricultural Marketing Agreement Act (7 U. S. C. 608c (15), *infra,* pp. 27–28) are in terms limited to handlers; they do not authorize review by any interested or aggrieved person. Nor does *Stark* v. *Wickard,* 321 U. S. 288, hold that a mere financial disadvantage gives a producer stand-

ing to seek review of a milk order. To the contrary, that decision was based on the express finding that a specific legal right of the plaintiff had been invaded (321 U. S. at 305, 308–309). The Court clearly pointed out that, absent such personal right, the alleged detrimental effect of the agency action would be merely *damum absque injuria* (321 U. S. at 304). Moreover, 7 U. S. C. 608c (3) (*infra*, pp. 26–27), which states expressly that the milk orders under the Act are not applicable to producers, negatives any notion that, pursuant to the general statutory plan, producers should be considered as persons adversely affected or aggrieved by such orders.

2. In any event, we submit that in this case the question of standing is purely hypothetical. Petitioners plainly cannot succeed on the merits.

The complaint challenges the Secretary's Order on two grounds. It claims, first, that the findings are arbitrary, capricious, and not supported by the evidence, and second, that the Secretary should not have submitted the referendum to all the producers supplying the marketing area but only to those who supplied the four towns. The court below properly held that both of these challenges to the validity of the Order are without substance.

(*a*) The Order is based upon a valid statute. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533; *Stark* v. *Wickard*, 321 U. S. 288, 310. Accordingly, it carries with it the presumption of the existence of facts justifying the exercise of the administrative action. *Pacific States Co.* v. *White*, 296 U. S. 176,

186; *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 567–568.

Moreover, a party who seeks to challenge the validity of a statute or regulation must allege specific facts. *E. g., Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163, 169–170; *Pacific States Co.* v. *White*, 296 U. S. 176, 184–186; *Dyer* v. *Gallagher*, 203 F. 2d 477, 479 (C. A. 6). The allegations of the complaint that the findings "were invalid as a matter of law as being contrary to the evidence * * * that no reasonable man could make on the evidence and were arbitrary and capricious" are at best "legal conclusions" or "epithets" (*Silberschein* v. *United States*, 266 U. S. 221; *Adams* v. *Nagle*, 303 U. S. 532, 542); they are insufficient to state a claim upon which relief can be granted (*Dyer* v. *Gallagher, supra*).

The evidence in the record—indeed, the very testimony introduced by petitioners themselves—fully supports the Secretary's findings. The affidavits submitted by petitioners in support of their motion for a preliminary injunction establish that they sell on the average all but three per cent of their milk as fluid milk.[17] Inasmuch as the industry must carry on the average a daily surplus burden of 15%–20%,[18] the record shows that petitioners do not bear their full share of the common burden of the surplus milk and that the Secretary's Order carried out the very purpose of the statute.

[17] Sparrow Affidavit, R. 86; Schofield Affidavit, R. 88, 89.

[18] *Nebbia* v. *New York*, 291 U. S. 502, 517. See also *Study of the Dairy Industry*, Hearings before the Subcommittee on Dairy Products of the Committee on Agriculture, House of Representatives, 84th Cong., 1st Sess., p. 183.

Similarly, the evidence introduced at the administrative hearing by those who opposed the extension of the Greater Boston Marketing Area to the four towns—including the testimony of the petitioner Schofield (R. 509–531)—established that the milk producers in the four-town area were able to sell all or almost all of their milk at fluid milk prices.[19] The reason for this as explained by petitioners' own witnesses was that the local producers were not able to supply the needs of the four-town area,[20] that considerable quantities of fluid milk and cream had to be imported from the Boston milk pool and out-of-state sources in order to compensate for the local milk deficit,[21] and that local handlers as a rule favored local producers by buying their entire fluid milk output and by obtaining the variable surplus demands from the outside.[22]

Thus petitioners' evidence alone justified the findings (*supra,* pp. 8–9) that, as a result of the local milk deficit and the preferential treatment they received from local dealers, local producers were able to sell all their milk at fluid milk prices and that all producers supplying the market should, in equity, share in the profits of the fluid milk sales and in the burden of the surplus milk.

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[19] R. 355, 488, 498, 552, 569, 580, 629, 631, 637, 642.

[20] R. 498.

[21] R. 488, 493–494, 498–504, 521–522 (testimony of the petitioner Schofield), 563–564, 580, 636.

[22] R. 498, 552, 580. Significantly, local handlers purchased from the Boston pool almost their entire cream supply for which producers do not get fluid milk prices. 7 CFR 904.15, 7 CFR 904.4 (a), (b); R. 710–713, R. 554, 580, 636.

The absence in the Order of any specific quantitative data concerning the amount and sources of the milk imported into the four-town area, of which petitioners complain (Pet. 6–7), was caused by the refusal of the Massachusetts Milk Commission and of the largest handler of the region to disclose those figures (R. 456, 469, 479). In those circumstances, the Secretary was obliged to rely on circumstantial evidence and his administrative experience. This Court has indicated that it will not review the exercise of administrative discretion in this area. *Stark* v. *Wickard,* 321 U. S. 288, 310. In any event, the administrative action is presumptively valid (*United States* v. *Rock Royal Co-op.,* 307 U. S. 533, 567–568), and petitioners have not set forth any facts to rebut that presumption.

Nor is there any merit to petitioners' argument (Pet. 12) that the Order is invalid because the Secretary found generally that the proposed Order would tend to effectuate the declared policy of the Act (R. 60) and did not make any detailed specific findings reciting each of the purposes of the Act. The complaint does not contain any allegations to that effect. Moreover, the Order itself (as finally issued) states that (21 F. R. 8132):

> The delay in the issuance of this order has already seriously impaired the orderly marketing of milk in the marketing area. * * *

(*b*) Petitioners' second argument in the complaint against the validity of the Order was the contention that the referendum should not have been submitted to all the producers supplying the Greater Boston Marketing Area as enlarged by the Order, but only to

the producers supplying the four towns. Petitioners have not specified this issue in the questions presented; accordingly, we assume that they have abandoned this issue. In any event, the court below properly held that no basis can be found in the statute for petitioners' argument and that the determination of the producers authorized to participate in the referendum conformed with the ruling of this Court in *H. P. Hood & Sons* v. *United States,* 307 U. S. 588, 597–599. Moreover, if any error was committed on this score, it was not prejudicial. Even if the voting had been limited to those supplying only the four towns, the Order would have been approved by a vote of 440 to 46 (R. 84). Petitioners' basic attack seems to be directed at the fact that co-operatives voted for their members. This, however, is required by the statute (*supra,* p. 6), and the pertinent provisions have been held constitutional by this Court. *United States* v. *Rock Royal Co-op.,* 307 U. S. 533, 559–560; *H. P. Hood & Sons* v. *United States,* 307 U. S. 588, 599.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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December, 1956.

APPENDIX

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U. S. C. 601ff, provides in pertinent part:[1]

SEC. 601. DECLARATION OF CONDITIONS.

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

SEC. 602. DECLARATION OF POLICY; ESTABLISHMENT OF BASE PERIODS FOR PRICES; MARKETING STANDARDS.

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601–608, 608a, 608b, 608c, 608d–612, 613–619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301 (a) (1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to es-

[1] In view of the many amendments to the Agricultural Marketing Agreement Act, which itself constitutes a reenactment of and amendment to the Agricultural Adjustment Act as amended (see *supra*, p. 6), we reproduce the statute as it now appears in Title 7 of the United States Code.

tablish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601–608, 608a, 608b, 608c, 608d–612, 613–619, 620, 623, and 624 of this title, to establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c (2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601–608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c (2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

* * * *

SEC. 608c. ORDERS REGULATING HANDLI
COMMODITY—

(1) Issuance by Secretary.

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from

time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

* * * * *

(3) Notice and hearing.

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order.

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of sections 601–608, 608a, 608b, 608c, 608d–612, 613–619, 620, 623, and 624 of this title with respect to such commodity.

(5) Milk and its products; terms and conditions of orders.

In the case of milk and its products, orders issued pursuant to this section shall contain one

or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

* * * * *

(8) Orders with marketing agreement.

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order.
* * *

(9) Orders with or without marketing agreement.

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers

(excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, 624 of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or

favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

* * * * *

(12) Approval of cooperative association as approval of producers.

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the aproval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

(13) Retailer and producer exemption.

(A) No order issued under subsection (9) of this section shall be applicable to any person

who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, 624 of this title shall be applicable to any producer in his capacity as a producer.

* * * * *

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary.

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States [including the district court of the United States for the District of Columbia] in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance

with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection shall not impede, hinder or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a (6) of the title. Any proceedings brought pursuant to section 608a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection.

* * * * *

(19) Producer referendum for approving order.

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section.

* * * * *

SEC. 610. ADMINISTRATION—

(a) Appointment of officers and employees; exemption from civil service regulations; salaries; impounding appropriations.

* * * * *

(b) State and local committees or associations of producers; handlers' share of expenses of authority or agency.

(1) The Secretary of Agriculture is authorized to establish, for the more effective administration of the functions vested in him by sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title, State and local committees, or associations of producers, and to permit cooperative associations of producers, when in his judgment they are qualified to do so, to act as agents of their members and patrons in connection with the distribution of payments authorized to be made under section 608 of this title. The Secretary, in the administration of said sections, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

* * * * *

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No. 595

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

ARTHUR SCHOFIELD, ET AL, *Petitioners*

v.

EZRA TAFT BENSON, Secretary of Agriculture,

and

NEW ENGLAND MILK PRODUCERS' ASSOCIATION, ET AL., *Respondents*

BRIEF FOR RESPONDENTS, NEW ENGLAND MILK PRODUCERS' ASSOCIATION, ET AL. IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	2
Argument	13
Conclusion	17

TABLE OF CASES

Alabama Power Co. v. Ickes, 302 U.S. 464 15
American Trucking Assns. v. United States, 344 U.S. 298 16
Baldwin v. Seelig, 294 U.S. 511 3
Currin v. Wallace, 306 U.S. 1 16
Hood & Sons v. DuMond, 336 U.S. 525 3
Hood & Sons v. United States, 307 U.S. 588 ..... 3, 4
Kansas City Power & Light Co. v. McKay, 225 F. 2d 924 14
Minnesota Rate Cases, 230 U.S. 352 16
Nebbia v. New York, 291 U.S. 502 3
Stark v. Wickard, 321 U.S. 288 ..... 14, 15
United Milk Producers of New Jersey v. Benson, 225 F. 2d 527 14
United States v. Rock Royal Cooperative, 307 U.S. 533 ..... 3, 12, 15, 16

STATUTES

Judicial Code, 28 U.S.C. §§ 2282 and 2284 11
Administrative Procedure Act, 5 U.S.C. § 1001 et seq. 14, 15
Agriculture Marketing Agreement Act, 50 Stat. 246, as amended (7 U.S.C. § 601 et seq.) 2, 3, 4, 6, 13, 16

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OPINIONS BELOW

The October 6, 1956, memorandum opinion of the United States District Court for the District of Columbia and the oral opinion of October 21, 1956, of the District Court are unreported. The opinion of the United States Court of Appeals for the District of

Columbia is reported in 236 F. 2d 719. The three opinions are printed in Appendix B, p. 41, of the petition for writ of certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1956 (R. 791). A petition for rehearing was denied on September 11, 1956 (R. 811). The petition for a writ of certiorari was filed November 26, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a milk producer has standing to challenge an order of the Secretary of Agriculture issued under the Agricultural Marketing Agreement Act of 1937, although such order does not impose any legal duties upon him and does not infringe any of such producer's legal rights.

STATUTES INVOLVED

The statutory provisions involved are the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. § 601 ff. These are printed as Appendix A, p. 21, of the Petition for Certiorari.

STATEMENT

The subject matter of this litigation is the milk-marketing problem. It is common knowledge that the production and marketing of milk are vital and that the problems of the industry have long engaged the notice of the Congress and state legislatures and the courts.

This Court has considered and dealt with the problems of this industry in *Nebbia* v. *New York*, 291 U.S. 502; *Baldwin* v. *Seelig*, 294 U.S. 511; *United States* v. *Rock Royal Co-operative*, 307 U.S. 533; *H. P. Hood and Sons* v. *United States*, 307 U.S. 588; *H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525.

The basic underlying problem of the industry arises from the nature of the product. Since there are daily fluctuations in the demand as well as periodic and seasonal fluctuations in supply, even flow and equal distribution of available fluid milk required to meet normal daily demands in an off-season, as a measure of normal need, may be vastly exceeded by large surpluses in full production months.

Because milk is highly perishable, such surpluses present the most vexing problem of the industry. Fluid milk as a food beverage commands a much higher price than milk utilized in other forms. It is natural that a producer of milk should seek to sell his production in the more profitable fluid-milk market. The public interest, however, requires that there be a normal supply of fluid milk at all times sufficient to meet the demands of the public for fluid milk.

This public interest, as well as a proper regard for the economic status of all producers as related to the economy as a whole, caused Congress to direct its attention to the complexities of the milk industry in the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, et seq.

To effectuate the purposes of the Act, including an equitable distribution of the burden of surplus milk, the Secretary of Agriculture has been given power, after due notice and opportunity for hearing, to issue

orders which are applicable to handlers, but are not applicable to producers or retailers. 7 U.S.C. §§ 608b, 608c, 608c(13).

The Boston Milk Order was issued pursuant to the provisions of the Act and was considered and sustained by this Court in *H. P. Hood & Sons* v. *United States*, 307 U.S. 588. That Order provides for two minimum price classifications: Class I which includes fluid milk and certain fluid milk products, and Class II which includes quantities in excess of what is required to meet current demands for fluid milk, which includes all other milk products such as butter, cheese, milk powder and other like items. It also provides for payment to the producers marketing this milk in the Boston marketing area of a "blended" or weighted average price. The Order also provides adjustments for higher costs principally depending on the location of the plant and the month of production. For example, milk produced in a plant not less than 40 miles from Boston is entitled to a price differential of 52¢ per cwt. of Class I milk and 38¢ per cwt. of Class II milk over milk produced 200 miles from Boston (Ex. 10, Section 904.42, R. 720, 721).

Before the Secretary may issue an Order, he must make two determinations specified in 7 U.S.C. § 608c(9). First the proposed Order must be approved by at least two-thirds of the producers supplying the marketing area specified in the order. In order to ascertain whether such a majority of the producers approves the issuance of an order, the Secretary may conduct a referendum among them and in conducting such a referendum, the statute requires that the approval or disapproval of a cooperative shall be

considered as the approval or disapproval of its members.

Second, the Secretary must determine that the failure of the necessary majority of the handlers to sign a marketing agreement tends to prevent the effectuation of the declared policy of the Act and that the issuance of the order is the only practical means of advancing the interests of the milk producers pursuant to the declared policy.

Pursuant to notice published March 18, 1953 (20 F.R. 1699-1700, Exhibit 2, R. 700), extended hearings were held during the Spring of 1955 on a number of proposals designed to amend the marketing orders regulating the handling of milk in four Massachusetts marketing areas. Among the amendments proposed was one to expand the Greater Boston marketing area so as to include the seven towns of Concord, Framingham, Lincoln, Natick, Sudbury, Wayland and Weston (Exhibit 57, R. 768).

Another proposal was to expand the Greater Boston area so as to include all the cities and towns in Middlesex County. On the basis of the evidence adduced at these hearings, the Deputy Administrator of the Agricultural Marketing Service on August 2, 1955, filed a detailed recommended decision which proposed among other things that the four towns involved in the instant litigaton, namely Framingham, Natick, Wayland and Weston be added to the Greater Boston Marketing Area. Interested parties were advised to file exceptions by September 2, 1955. Exceptions challenging the sufficiency of the evidence on which the recommended decision was based were filed by four local dairy groups (R. 20-23).

The Commonwealth of Massachusetts also filed exceptions claiming that only producers located in the four towns, rather than all producers serving the Greater Boston Area, should be permitted to participate in the referendum to be held under 7 U.S.C. § 608c(19).

On September 13, 1955, the Acting Secretary of Agriculture overruled these exceptions and issued his decision recommending the inclusion of the four towns in the Greater Boston Marketing Area and directing that a referendum be conducted to determine whether a sufficient percentage of the producers favored the issuance of an order to that effect. (R. 27-61, 21 F.R. 6932-6939). The Acting Secretary made the following pertinent findings of fact:

> "*Findings and conclusions* — 1. *Boston Area extension.* The limits of the Greater Boston marketing area should be extended to include the towns of Framingham, Natick, Wayland and Weston. The marketing area as presently constituted includes 38 contiguous Massachusetts cities and towns comprising a substantial portion of the Greater Boston metropolitan area. A substantial cooperative association of producers proposed that the area be extended to include the seven additional towns of Framingham, Natick, Wayland, Weston, Sudbury, Concord and Lincoln. Another proposal would extend the area to include all of that portion of Middlesex County not presently under Federal regulation.
>
> "The four towns herein recommended for inclusion in the marketing area are a part of Boston's suburban area and lie directly west of and are contiguous to the present marketing area. The towns of Framingham and Natick, in particular, are experiencing a very dynamic transi-

tion to an intensive residential and industrial area. The proximity of this four-town area to Boston and its location with regard to modern transportation facilities have played an important role in its rapid development and there is every indication that the rapid urbanization will continue.

"The four-town area herein under consideration is served by approximately 30 handlers, 14 of which are fully regulated Boston or Worcester handlers. While statistics on relative volumes, numbers of routes and similar quantitative data are lacking there is no question but that regulated Boston handlers are the primary handlers serving this area and that such distribution is substantial.

"The Hood Company, one of the principal Boston handlers, serves most of this four-town area from its Natick plant, a loading station which is supplied from its East Bridgewater plant, primarily with unregulated milk. Under usual circumstances, it would be expected that location with respect to Boston would direct that this area be served from Hood's Boston City plant. Testimony of responsible witnesses, however, indicates that the unregulated East Bridgewater plant is used in order to meet unregulated competition in the area.

"A substantial portion of the annual volume of milk handled at the East Bridgewater plant is Boston pool milk which is fully priced under the order. However, the record is clear that much of this volume is flavored milk and milk in special packages disposed of throughout the much larger area served by the East Bridgewater plant. Solely as a matter of processing economy it is handled in the Boston city plant and then transferred to Bridgewater for distribution. In addition, Boston pool milk is requisitioned whenever local producer milk and available unregulated supplies are less

than minimum needs. Hence, while total receipts of regulated milk at the Bridgewater plant may be of such volume as to possibly equal, or even exceed, Hood's fluid distribution in the recommended area of extension, much of this milk is special packaged milk and flavored milk disposed of outside of this area. It is obvious that the company enjoys an advantage through its ability to use unregulated milk, purchased at or about the Boston blend to supply much of its regular fluid requirements for this four-town area, in competition with handlers who are fully regulated under the Boston order.

"The record shows that in addition to the Hood Company other substantial dealers not under Federal regulation who distribute in this area obtain much of their fluid requirements from unregulated country plants in Vermont and New Hampshire. In this respect their advantage over regulated Boston handlers distributing in the area is similar to that of the Hood Company.

* * * * *

"Producers delivering milk to local dealers opposed any extension of the marketing area, contending that their participation in the Boston pool would result in substantial financial loss to them. There is no question but that the producers supplying milk to local dealers serving the area herein recommended for inclusion have had a preferential market for their milk. These producers have generally received a straight Class I price for all of their milk. This has been possible because local production is adequate to supply only a small part of the total fluid milk needs of the area. Local dealers obtain a substantial part of their total fluid requirements from unregulated upcountry plants in New Hampshire and Vermont or from the Boston pool. While the record is not clear in regard to the

manner in which this milk reaches the local dealers' plants or the cost of such milk it is significant that the largest handler serving the area has used unregulated milk, purchased at or about the Boston blended price to meet competition in the area.

"The additional towns herein recommended for inclusion are a part of the natural area of distribution for Boston handlers who presently do a very substantial business there. Local production is insufficient to supply these towns which therefore must look to the Boston pool for an assured long-run milk supply. All producers having a bona fide association with the fluid market should share equitably in the proceeds from sales in the market. The present pooling and pricing scheme under the Boston order will promote this principle."

The decision directed that the referendum be held among those producers who during the month of April, 1955, determined to be the representative period were engaged in the production of milk for sale in the Greater Boston Marketing Area as then defined, as well as in the four towns to be added to the area pursuant to the proposed amendment.

Pursuant to this decision, the referendum agent made up the list of producers qualified to vote in the referendum (R. 75-78). The names of the producers supplying the Greater Boston Area were taken from the records of the Market Administrator. Those records disclosed that 12,297 producers supplied the marketing area. Of these 9,089 were members of cooperatives and 3,208 were not. The referendum agent also found that more than 10,000 of the producers supplying the Greater Boston Marketing Area sent

milk to plants from which milk was moved directly or indirectly to consumers in the four-town area proposed to be added (R. 75, 76).

In order to determine the names and addresses of producers not presently supplying the Greater Boston Marketing Area who were producing milk for sale in the four-town area, the referendum agent made detailed inquiries of the Massachusetts Milk Control Commission and of handlers supplying the area. On the basis of this information, he found that there were 677 additional producers entitled to vote of whom 93 were residents of Massachusetts (R. 76-79).

On September 16, 1955, the referendum agent mailed ballots to those cooperatives of which eligible producers were members and to those eligible producers who were not members of the cooperatives advising them that if their votes were to be considered, they would have to be received or post-marked not later than September 23, 1955 (R. 83).

On September 19, 1955, the petitioners, President and Secretary of the Central Massachusetts Dairy Association, purporting to act on behalf of themselves and of the other members of the Association similarly situated, filed a complaint in which they attacked the validity of the Secretary's decision as being contrary to the evidence and arbitrary and capricious and complained particularly of the manner in which the referendum was being conducted. They allege upon information and belief that if the order were extended to the four towns, local milk producers would lose 50¢ per cwt. milk, or on the average, $1,000 per annum. The complaint asked for permanent and

interlocutory relief enjoining the completion of the referendum.

At the time of filing the complaint, appellees applied for and were granted a temporary restraining order enjoining the Secretary from conducting, consummating or effectuating the referendum. This order was vacated on September 21, 1955, on the basis of a stipulation pursuant to which the Secretary agreed not to issue any order until after argument and determination of the petitioner's motion for preliminary injunction. The referendum was thereupon concluded and the results were tabulated by the referendum agent. According to the tabulation, the proposed order was approved by a vote of 9,698 to 107. The vote of those covered in the original Greater Boston Marketing Area was 9,258 to 61. Producers supplying the four-town area but not previously included in the Boston pool favored the order, 440 to 46 (R. 84).

The petitioners amended their complaint and asked for a preliminary injunction enjoining the Secretary from amending the present Boston Marketing Order. They also filed a motion for a three-judge court in conformity with 28 U.S.C. §§ 2282 and 2284.

On September 27, 1955, a hearing on petitioners' motion for a preliminary injunction was held before Judge Pine. Petitioners argued that they would suffer irreparable harm if the Secretary of Agriculture issued an order incorporating the four towns into the Boston Marketing Area.

In addition, counsel for the petitioners made strong representations to the effect that there was no evidence to support the Secretary's findings and that they were a tissue of falsehoods. The District Court stressed in

its oral opinion "that petitioners' attorney had stated as a member of the bar that there was no evidence to support the findings, that the verified complaint contained the same allegations and that all I have against that is your (Government counsel's) statement that there is evidence to support it." (R. 194-195).

The memorandum decision of October 6, denied the motion for a three-judge court holding that no substantial constitutional question was involved as that issue was long since settled in the affirmative by the Supreme Court in *United States* v. *Rock Royal Coop.*, 307 U. S. 533. The court, however, held that the petitioners were entitled to a preliminary injunction.

Before the preliminary injunction was actually issued, the Secretary moved for a modification of the decision. The District Court rejected the Secretary's petition. Prior to the filing of the memorandum opinion of October 7, a certified copy of the record of the administrative hearing and the answer of the Secretary was filed.

On October 18, 1956, New England Milk Producers' Association and other cooperative associations representing producers marketing milk in the Greater Boston Marketing Area filed a motion to intervene as defendants and on October 20 a similar motion was filed on behalf of United Farmers of New England and other cooperative associations similarly engaged. These motions to intervene were allowed November 16, 1956 (R. 306).

Appeals from the order of the District Court granting the petitioners an injunction and from the order denying the motion of the Secretary for modification were taken by both the Secretary and

the Intervenors. On June 29, 1956, the Court of Appeals handed down its decision holding that the complaint was prematurely filed and in addition holding that the plaintiffs had no standing to bring this action in any event.

A petition for rehearing *en banc* was filed by the petitioners and was denied September 11, 1956. On October 18, 1956, the District Court entered an order in conformity with the opinion of the Court of Appeals dismissing the complaint and on October 18, 1956, the Secretary of Agriculture issued the amended order to become effective November 1, 1956 (21 F.R. 8131).

ARGUMENT

The Petitioners Have No Standing to Challenge the Order

The petitioners lack standing to challenge the order, because it imposes upon them no legal obligation nor does it deprive them of any rights.

The Act imposes legal obligations upon milk handlers. It expressly provides that orders issued by the Secretary shall not be applicable to any producer in his capacity as a producer (7 U.S.C. § 608c (13)(B). (Petition for Certiorari, p. 34). These petitioners are producers and bring this action in their capacity as producers. Their complaint of the adverse effect of the order upon them is therefore not of a legal nature. They complain that the effect of including the four towns in the Boston marketing area under the order will be to reduce the returns which they will receive for their milk.

This result is purely of an economic nature. The prices established by the order are minimum prices. There is no provision of the order which prohibits

or prevents any handler from paying to the Petitioners a higher price. Neither the Act nor the order require producers to do or refrain from doing anything. The petitioners have not shown interference or prospective interference with any legally-protected right. In order to have standing to challenge the order, the petitioners must show that an act of the Secretary amounts to an interference with some legal right of theirs. *Stark* v. *Wickard,* 321 U.S. 288, 290.

Petitioners must show more than an economic disadvantage. In the absence of a legally protected right, petitioners lack standing to sue. *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924, 934, certiorari denied 350 U.S. 884; *United Milk Producers of New Jersey* v. *Benson,* 225 F. 2d 527.

In *Stark* v. *Wickard,* 321 U.S. 288, upon which petitioners rely, the producer was held entitled to challenge an order which infringed a legal right of his, namely the making of an unauthorized deduction from the fund belonging to the producer. No such situation appears in this case. Here petitioners merely allege that if the order is extended and made applicable to the handlers to whom they deliver their milk, they will suffer economic disadvantage.

Mere loss of income in consequence of the action of Government or economic disadvantage, by itself, constitutes *damnum absque injuria* which does not confer standing. *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924, 934; *Stark* v. *Wickard,* 321 U.S. 288.

The Administrative Procedure Act does not give status to challenge administrative action where legal injury is not suffered by the petitioners. Section 10

of that Act gives a right of judicial review to one who can establish he has suffered legal wrong as the result of agency action. Unless the producer can show a legal wrong, he has as little standing to sue as a consumer. *Alabama Power Co.* v. *Ickes,* 302 U.S. 464; *United Milk Producers of New Jersey* v. *Benson,* 225 F. 2d 527, 529; *Stark* v. *Wickard,* 321 U.S. 288, 290.

Section 10 of the Administrative Procedure Act requires something more than a mere adverse personal effect. The adverse effect must be an illegal effect. Report of Senate Committee on the Judiciary on S. 7, Senate Report No. 752, 79th Congress, 1st Session, p. 212.

Constitutionality. The motion of petitioners in the District Court that a three-judge court be convened (R. 74) was denied with a finding that no substantial question of constitutional validity existed, as that issue was long since settled in the affirmative by the Supreme Court in *United States* v. *Rock Royal Co-op.,* 307 U.S. 533 (R. 201). The Court of Appeals assumed the constitutionality of the Agricultural Marketing Agreement Act of 1937.

In their petition, petitioners seek to have this Court reverse its conclusions of constitutionality of the act on some tenuous and nebulous ground that the commerce clause of the Constitution is a limited grant of power to regulate interstate commerce. This very question was given careful consideration by this Court in *United States* v. *Rock Royal Cooperative,* 307 U.S. 533, 569, where it was held "where sales for interstate transportation were commingled with intrastate transactions, the existence of local activity did not interfere with the Federal power to regulate the

whole." * * * "The power over commerce when it exists is complete and perfect." *Currin* v. *Wallace,* 306 U.S. 1; *Minnesota Rate Cases,* 230 U.S. 352, 358.

There is no occasion to reconsider this doctrine; it has already been reviewed as to the substance of the constitutional issues involved. The Court has said:

> "This Court has pointed out many times that the exercise of the federal commerce power is not dependent on its maintenance of the economic *status quo;* the Fifth Amendment is no protection against a congressional scheme of business regulation otherwise valid, merely because it disturbs the profitability or methods of the interstate concerns affected."

American Trucking Assns. v. *United States,* 344 U.S. 298, 322, fn. 20; *Currin* v. *Wallace,* 306 U.S. 1, 13-15; *United States* v. *Rock Royal Co-op., Inc.,* 307 U.S. 533, 572-573.

Nowhere in the Agricultural Marketing Agreement Act is there any definition of what constitutes a marketing area. The Act authorizes a marketing agreement and order to be issued for such production or marketing regions or areas as are practicable. *United States* v. *Rock Royal Co-op.,* 307 U.S. 533, 576. The Secretary has found on the basis of the evidence adduced at the hearing that the four towns here involved are a part of Boston's suburban area and lie directly west of and are contiguous to the present marketing area (R. 29) and that a substantial portion of the milk distributed in this four-town area comes from Boston handlers and that these Boston handlers are the primary handlers serving this area in question (R. 30); that these four towns are a part of the

natural area of distribution for Boston handlers who presently do a very substantial business there (R. 31).

In view of these findings of the Secretary, it is clear that in issuing the order adding the four towns in question to the marketing area, the Secretary was acting within the area of the authority granted to him by the act.

These respondents respectfully submit that the petitioners fail to show any basis upon which a constitutional question may be raised.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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